

RIDDLED RETURNS

HOW ERRORS AND FRAUD BY PAID TAX PREPARERS PUT CONSUMERS AT RISK AND WHAT STATES CAN DO



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EXECUTIVE SUMMARY

A tax return is one of the most critical financial events for many consumers during the year. Over half of these consumers rely on paid tax preparers, putting their financial lives in the hands of these practitioners. Yet there is no regulation for most tax preparers in the vast majority of states. There are no minimum educational, training, competency, or other standards. In 46 states, there are more regulatory requirements for hairdressers than tax preparers.

Because of this lack of regulation, incompetence and abuses by tax preparers have flourished over the years. Mystery shopper testing by consumer groups, other advocacy organizations, and government agencies has found frequent examples of this incompetency and outright fraud — a disturbingly high number, given the limited number of tests conducted. Some of the examples uncovered in this testing were:

- Intentional omission of income;
- Falsifying information to make the taxpayer eligible for various credits and deductions, such as charitable deductions, job-related or business expenses, and the Earned Income Tax Credit (EITC);
- Inability to properly deal with education-related credits and income;
- Misclassifying filing status; and
- Data entry errors resulting in incorrect refunds.

These numerous examples of fraud and incompetence, comprising a significant percentage of the preparers tested, shows that this problem is not isolated or the case of a few bad actors. Instead, it is an endemic problem and regulation is urgently needed to protect both taxpayers and public treasuries.

Another problem faced by taxpayers is the inability to comparison shop or predict how much tax preparation will cost them, because many tax preparers claim they cannot give a quote or give inaccurate ones. As a result of this lack of transparency, consumers face tax preparation fees that are very high, and sometimes inflated – up to \$400 or \$500 in some cases.

The IRS attempted to address fraud and improve preparer competency by developing a system to regulate tax preparers. However, in early 2013, this effort was blocked by a federal court, which invalidated the regulations as exceeding the IRS's statutory authority. This decision was upheld in February 2014 by the D.C. Court of Appeals. Thus, it is up to Congress or the states to institute a system of preparer regulation.

To assist states toward this goal, this report includes the **Model Individual Tax Preparer Regulation Act**, which a state legislature can enact for the regulation of tax preparers, based in large part on three of the four existing state laws, as well as the IRS regulations.

The Model Act requires paid tax preparers to:

- Obtain a registration unless they fit into one of the handful of exceptions,
- Pass a basic competency exam,
- Have 60 hours of initial education and 15 hours per year of continuing education, and
- Provide a standardized disclosure of their fees.

For consumers, an incorrectly prepared tax return can lead to dire economic consequences or even criminal sanctions. This is especially true for low-income EITC recipients, of whom over 60% — or 16 million families — pay for tax preparation. For these consumers, especially EITC recipients, their refund is the single largest sum of money that they will receive during the entire year. Passage of the Model Act will allow these consumers to be confident that the tax preparer that they rely upon has the basic skills and knowledge needed to prepare their tax returns correctly.

A. Startling Lack of Regulation for Tax Preparers

For many individuals, filing a tax return is the most critical financial interaction they have with the federal government during the year. An incorrectly prepared return can lead to dire economic consequences or even criminal sanctions. And for many consumers, especially recipients of the Earned Income Tax Credit (EITC), their tax refund is the single largest sum of money that they will receive during the entire year.

Over half of these consumers rely on paid tax preparers, putting their financial lives in the hands of these practitioners. This is especially true for low-income EITC recipients, of whom over 60% – or 16 million families – pay for tax preparation.¹

Yet for many decades, there was no regulation for these critical actors in the vast majority of states, with only a handful of exceptions.² There were no minimum educational, training, competency, or other standards for the businesses that could determine the consumer’s financial fate for the coming year. While some tax preparers are licensed as certified public accountants or credentialed by the IRS as enrolled agents, the vast majority do not have such qualifications. Indeed, the only tax preparers apart from CPAs and enrolled agents subject to testing and regulatory oversight are the unpaid volunteers at Volunteer Income Tax Assistance sites.³

In 46 states, there are more regulatory requirements for hairdressers than tax preparers.

In 46 states, there are more regulatory requirements for hairdressers than tax preparers.⁴ Yet the impact of a bad haircut is far less damaging than an inaccurate tax return.

In 2011, the IRS attempted to address this issue by developing a system to regulate tax return preparers. The IRS regulations required preparers to register with the IRS, take a competency

¹ Data from IRS Stakeholder Partnerships, Education & Communication (SPEC) Return Information Database for Tax Year 2010 (Returns Filed in 2011) (Jan. 2013). In general, over half of taxpayers (56%) use a paid tax preparer. *Id.*

² The exceptions are California, Maryland, New York, and Oregon. See Cal. Bus. & Prof. Code §§ 22250 to 22259; Md. Code §§ 21-101 to 21-502; N.Y. Comp. Codes R. & Reg. tit. 20, pt. 2600 (Dec. 2013), and Or. Rev. Stat. §§ 673.605 to 673.740. In addition, some states require registration of persons that offer RALs. See National Consumer Law Center, *Model Refund Anticipation Loan Act*, Appendix A (Dec. 2008) (summary of state RAL laws), available at <http://www.nclc.org/ralmodel>.

³ VITA sites have long followed fundamental training and certification requirements. See IRS, Pub. 1084 - IRS Volunteer Site Coordinator’s Handbook 29 (Oct. 2012)(requiring that all “[v]olunteer preparers must pass at least the basic certification test. A minimum score of 80% is required for each certification test”)

⁴ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2012-13 Edition*, Barbers, Hairdressers, and Cosmetologists, available at www.bls.gov/ooh/personal-care-and-service/barbers-hairdressers-and-cosmetologists.htm (visited July 22, 2013)(noting that all states require hairdressers to be licensed).

examination, and stay current with tax law developments through continuing education.⁵ However, the IRS effort was blocked on January 18, 2013, when the federal district court for the District of Columbia issued a surprising decision invalidating the regulations as exceeding the agency's statutory authority.⁶ In February 2014, the D.C. Court of Appeals upheld the lower court's ruling.⁷

This report discusses the need for preparer regulation to protect both taxpayers and the public treasury. It details the massive amount of fraud and incompetence uncovered by just a handful of mystery shopper tests by consumer groups, advocacy organizations, and government agencies. These repeated examples of fraud and incompetence, comprising a significant percentage of the preparers tested, shows that this problem is not isolated or the case of a few bad actors. Instead, it is an endemic problem that must be addressed by systemic reform, that is, comprehensive regulation of tax preparers.

B. Nature of the Tax Preparation Industry

The tax preparation industry consists of three larger commercial chains (H&R Block, Jackson Hewitt, and Liberty Tax Service), a number of smaller chains, and many thousands of small or solo independent preparers.⁸ There is a wide range of independent preparers, from licensed professionals – such as attorneys, enrolled agents, and certified public accountants – to businesses that primarily deal in another line of goods and services.

Among the last group, there is a segment that is highly problematic – the fringe preparer. Fringe preparers include businesses that are historically associated with the exploitation of consumers, such as payday loan stores, check cashers, and used car dealers. Some retailers, such as jewelry and furniture stores, also act as fringe tax preparers. Many of these preparers encourage clients to use their tax refunds for large purchases.

In June 2008, the Government Accountability Office (GAO) conducted mystery shopper testing that focused on identifying types of businesses where financial products related to tax refunds, such as refund anticipation loans (RALs)⁹ were marketed.¹⁰ Of the 27 paid preparers subject to testing, 13 were located in businesses that target low-income consumers, such as check cashers,

⁵ Internal Revenue Service, *Regulations Governing Practice Before the Internal Revenue Service*, 76 Fed. Reg. 32,286 (June 3, 2011).

⁶ *Loving v. I.R.S.*, 920 F. Supp. 2d 108 (D.D.C. 2013).

⁷ *Loving v. I.R.S.*, ---F.3d ---, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014).

⁸ See Chi Chi Wu and Jean Ann Fox, NCLC and Consumer Federation of America, *RALs, Tax Fraud, And Fringe Preparers* 11 (Feb. 2009), available at http://www.nclc.org/images/pdf/high_cost_small_loans/ral/2009-ral-appendix.pdf.

⁹ See note 14 for an explanation of what a refund anticipation loan is.

¹⁰ Government Accountability Office, *Refund Anticipation Loans*, GAO-08-800R, June 5, 2008, available at <http://www.gao.gov/new.items/d08800r.pdf>.

payday loan vendors, rent-to-own stores, and pawn shops. Nine of the preparers in the GAO study offered incentives to encourage tax customers to spend their refunds on the businesses' primary goods and services. For example, an auto dealer told GAO investigators that if they didn't have enough money for the down payment on a car, they could get their taxes done by its tax preparer and use the refund as a down payment. Another preparer operated out of a shoe store, and offered a free pair of shoes with tax preparation.

A fundamental problem with fringe preparers is the questionable quality of tax preparation by a business that specializes in goods and services other than tax preparation. The mystery shopper tests discussed later in this report found several instances of incompetent tax preparation by fringe preparers. One particular example was an Alabama small loan company that prepared a tester's return to show a \$6,247 refund when the tester actually owed \$112 to the IRS.¹¹

There are even third-party vendors that specialize in providing software and back office support to businesses that want to prepare taxes "on the side" to boost sales in their primary line of business. One example is Tax Max, which specifically caters to used car dealers. Tax Max advertises that it is "the leading tax consultant in the industry with a portfolio of over 3000 car dealerships nationwide."¹² Tax Max informs car dealers that "[t]here is no experience required, and our web-based program was designed for use by someone who knows nothing about taxes."¹³

C. Abuses Uncovered by Mystery Shopper Testing

Due to the lack of regulation, abuses by tax preparers have flourished over the years. Mystery shopper testing by consumer and other advocacy groups has found frequent examples of incompetency and fraud by tax preparers – a disturbingly high number, given the limited number of tests conducted. Regulation, whether by the federal or state government, is urgently needed to prevent incompetence and fraud by ensuring that paid preparers meet minimum standards.

Some of the types of incompetence and fraud uncovered in this testing were:

- Intentional omission of income;
- Falsifying information to make the taxpayer eligible for various credits and deductions, such as charitable deductions, job-related expenses, Schedule C business expenses, and the EITC;

¹¹ Impact Alabama, *Impact Alabama Undercover Investigation of Commercial Tax Preparers in Alabama Results and Analysis*, Jan. 2009.

¹² Tax Max, About Us, at <https://www.taxmax.com/TRSTaxMax/AboutUs.aspx>.

¹³ Tax Max, FAQ, at <https://www.taxmax.com/TRSTaxMax/FAQ.aspx>

- Inability to properly deal with education-related credits and income;
- Misclassifying filing status; and
- Data entry errors resulting in incorrect refunds.

1. 2008 Mystery Shopper Testing

In 2008, advocacy groups conducted 17 mystery shopper tests of paid tax preparers in Durham, North Carolina and Philadelphia, Pennsylvania.¹⁴ Testers were instructed to have their returns prepared and to obtain RALs from commercial preparers. The original intent of the testing was to determine whether tax preparers were properly making disclosures concerning refund anticipation loans (RAL)¹⁵ and refund anticipation checks (RACs).¹⁶ Unfortunately, the testing also uncovered instances of serious tax errors and fraud in 4 out of 17 tests – or nearly 25%.

The worst example involved a preparer at a small loan company in Durham, where the tester withdrew because of the seriousness of the incompetence. According to this tester:

After sitting in the office for an hour or so, [the preparer] said that there was a problem that she did not know how to handle. The problem was that there was a \$5000 [fictional number] “dividend” that we must pay taxes on. With the dividend, our return would only return \$100. If she was to “ignore” it, then we would receive \$3000 in returns. She then called her “tax people,” [who] told her that we do not need to report the dividends and just ignore it.¹⁷

Mystery shopper testing by consumer and other advocacy groups has found frequent examples of incompetency and fraud by tax preparers – a disturbingly high number, given the limited number of tests conducted.

Essentially, this preparer gave the tester advice to commit tax fraud. This tester concluded: “My experience with [the independent preparer] has been a scary one. I say that mainly because the

¹⁴ Chi Chi Wu, et al., NCLC, Community Reinvestment Association of NC, and Community Legal Services of Philadelphia, *Tax Preparers Take a Bite Out of Refunds: Mystery Shopper Test Exposes Refund Anticipation Loan Abuses in Durham and Philadelphia* (Apr. 2008), available at www.nclc.org/images/pdf/high_cost_small_loans/ral/shopper_report.pdf [hereinafter “2008 Mystery Shopper Testing Report”].

¹⁵ A refund anticipation loan (RAL) is a short term loans secured by and repaid from the proceeds of a consumer’s tax refund. RAL lending was dramatically curtailed as a result of regulatory actions by federal banking regulators and the IRS. Currently, RALs are only available from a limited number of non-banks, who cannot make the loans on the same scale.

¹⁶ A refund anticipation check (RAC) is a bank product involving temporary bank account. The temporary account is used to receive a direct deposit of the consumer’s refund from the IRS. After the refund is received, the bank deducts a fee for the RAC, as well as the tax preparation fee. The remainder is issued to the consumer in the form of a paper check, prepaid debit card, or a direct deposit to the consumer’s own bank account.

¹⁷ 2008 Mystery Shopper Testing Report at 9.

lack of confidence in the preparer's ability to competently complete our return even though she was generally nice."¹⁸

In Philadelphia, a Jackson Hewitt preparer failed to include \$3,500 in unemployment income in the return of a married couple who were testers. This omission resulted in a refund that was \$600 greater than the couple was entitled to, and required them to file an amended return. This preparer also had never seen a mortgage interest Form 1098 and didn't know how to deal with it.

An independent preparer in Philadelphia made numerous errors in dealing with education-related tax credits. Among other mistakes, the preparer incorrectly treated a taxable education award as though it were an exempt scholarship, resulting in an additional tax liability of \$66 and a loss of \$134 worth of Earned Income Tax Credit. The tester was also forced to file an amended return.

At least two of the preparers in this 2008 testing were businesses that primarily sold other goods or services. One preparer was a small loan lender/payday lender, and the other preparer was in a store that primarily operated as a gift shop.

2. 2010 Mystery Shopper Testing

In 2010, consumer groups conducted 19 mystery shopper tests in Arkansas, New York City, and Durham, North Carolina.¹⁹ As in the 2008 testing, several testers became the victims of incompetent tax preparation or outright fraud – at least 6 out of the 19 testers, or over 30%.

A very disturbing example came from a tester in New York City who described how the preparer, when realizing the tester would receive only a \$1,000 federal refund and would owe state taxes, began making up deductions:

[The tester] reported that the tax preparer tried to entice her to commit tax fraud by showing her how much her federal refund would increase if she took deductions in excess of the standard deduction. [The tester] does not attend church, but the tax preparer included a \$2,000 church donation. The preparer also deducted the cost of work clothes and laundry, then showed [the tester] that her federal refund would increase to \$3,000 from about \$1,000. The preparer also tried to convince [the tester] to make up a dependent as she does not have any – showing her that her refund would go up to \$5,000

¹⁸ *Id.* at 10.

¹⁹ Chi Chi Wu, et al., National Consumer Law Center, Arkansans Against Abusive Payday Lending, New Economy Project (formerly NEDAP), Community Reinvestment Association of NC, *Tax Preparers Out of Compliance: Mystery Shopper Testing Exposes Violations of Refund Anticipation Loan Laws in Arkansas, New York and North Carolina* (Apr. 2010), available at www.nclc.org/images/pdf/high_cost_small_loans/ral/mystery_ral_report.pdf [hereinafter "2010 Mystery Shopper Testing Report"].

if she did so. The preparer also tried to qualify her for EITC even though she is not eligible. Finally, the tax preparer deducted \$400 in 2008 tax preparation costs even after [the tester] told the preparer that she did not pay for tax preparation last year.²⁰

Another example of attempted tax fraud by a preparer came from a tester in Arkansas who described how:

[The preparer] took the forms I had completed and requested my W2's which I gave them to him. He mistakenly thought that my 1099 was my tithing statement from my church. I told him it was my salary from my second job. He entered the amount and stated that I would be really disappointed if I knew the difference in my refund now that I have this additional income reported. I asked what was the difference, he stated I went from around \$30?? [i.e. \$3,000] To only \$15?? [i.e., \$1,500]. He wanted to know if I still wanted to report the additional income. I told him yes, I did because this income has already been reported to the IRS. Since I have been working this part time job, my refund has been less and I even have to pay State Taxes sometimes. He then told me how much I will owe the state for taxes. He again asked me if I was sure I wanted to report this. I told him again, yes, I do. I need to keep it clean. He said he had to ask because some people don't want them to report additional income because it lowers their refund amount. So he has to do what the customers tell him to do.²¹

Other testers reported either fraud or incompetent preparation, including:

- A tester in New York reported that a Jackson Hewitt preparer advised her not to include \$300 in income for which the tester had not received a 1099 form.
- A tester who went to a small chain in Arkansas later had her tax return reviewed by a Volunteer Income Tax Assistance (VITA) volunteer. The VITA preparer found numerous errors, resulting in the tester being required to file an amended return and to reimburse the IRS \$822.

Another example of preparer abuse came from a complaint in North Carolina against Freedom Tax Services, an independent preparer. This consumer could not participate in the testing. Why? Freedom Tax Services had already prepared her taxes without her permission, after she had given them her documents merely to get an estimate of the tax preparation fees.

Finally, there were several violations of requirements for tax preparers to provide certain documents to the taxpayers. The IRS Code requires preparers to provide a copy of the tax return to the taxpayer no later than the time that the taxpayer signs it.²² Yet 3 of the 19 preparers did not provide a complete copy of the tax return at the time of filing, but instead withheld the copies until the refund was received and the preparer was paid from the refund.

²⁰ *Id.* at 3.

²¹ *Id.* at 3-4.

²² I.R.C. § 6107(a).

3. 2011 Mystery Shopper Testing

In 2011, consumer groups conducted nine mystery shopper tests in New York City and Durham, North Carolina.²³ As in the earlier rounds of testing, several testers were the victims of incompetent tax preparation or were encouraged to engage in tax fraud — at least four out of the nine testers, or a whopping 44%.

A very disturbing example in the 2011 testing came from a New York City tester who went to a Liberty Tax office. The tester described how the preparer could not initially process a 1099 form that she had received for a credit card debt that was settled:

His boss came over to assist the tax preparer with the 1099. [The tester] asked if the 1099 would change her tax refund, and the preparer answered that they would “fix it.” The tax preparer and his boss proceeded to ask her a number of questions including: did she have money in the bank, valuables like jewelry, a 401k or other investments, or other debts. [The tester] answered that she had a 401k at work, some money in the bank as she recently deposited a substantial check for one of her daughters, and that she had about \$10,000 in combined credit card and student loan debt. She asked how they would “fix it.” The preparer responded that they needed to make it look like she had other debts that prevented her from affording the credit card debt that was forgiven (to make her look deserving of the forgiveness, was [the tester’s] understanding), and that she had no assets to sell. The preparer and his boss filled out a worksheet with her answers to their questions, but they did not provide her with a copy.²⁴

In addition, this preparer improperly claimed the EITC for one of the tester’s daughters. Finally, the tester observed that the preparer reported on a form that the tester did not know the location of her children’s father. However, the preparer never asked that question and the tester did know where her children’s father was.²⁵

Another example involved a Jackson Hewitt preparer in New York City who gave questionable advice to a tester who owed money to the IRS. The preparer told the tester that she “needed to get a kid” in order to get a bigger tax refund.

A third tester reported that she informed the preparer that she was no longer a student but the preparer incorrectly claimed the New York State tuition credit. The tester also reported that the

²³ Chi Chi Wu, et al., NCLC, New Economy Project (formerly NEDAP), Community Reinvestment Association of NC, *Tax Time 2011: Mystery Shopper Testing in New York and North Carolina Finds Continuing Problems with Tax Preparers* (Apr. 2011), available at www.nclc.org/images/pdf/pr-reports/report-mystery-ral-shopper-2011.pdf [hereinafter “2011 Mystery Shopper Testing Report”].

²⁴ *Id.* at 3.

²⁵ This was probably a follow-up question to “Can anyone else claim this child?,” which is asked by IRS Form 8867, the checklist for the EITC. This information would be listed in the tax preparer’s internal notes, not on the actual tax return.

preparer incorrectly inputted student loan interest, misspelled her address, and pressured her to sign the return without explaining the paperwork.

In North Carolina, a Jackson Hewitt preparer erroneously failed to claim Head of Household status for a tester. As a result, the tester's refund was smaller by \$269 for her federal refund and \$84 for her state refund, and she was forced to file an amended return.

4. *2011 First Nations Development Institute (FNDI) Mystery Shopper Testing*

First Nations Development Institute (FNDI) is an organization focused on strengthening American Indian economies to support healthy Native communities. Two of its key areas of work are combating predatory lending and promoting financial education. FNDI conducted 12 mystery shopper tests in New Mexico, all in communities with high Native American populations and located near reservations.²⁶ In this testing, 10 of the 12 taxpayers encountered problems with inaccurate, illegal, or unprofessional behavior. In 7 cases, the tax preparation process was stopped or changed to avoid having the paid preparer file an inaccurate tax return.

One of the worst errors was a preparer's failure to include unemployment insurance benefits as taxable income. This omission incorrectly qualified the taxpayer for the EITC, which could have significant ramifications. If the IRS caught the omission of the unemployment income, the refund would be lowered and the EITC would be denied. A taxpayer can be disallowed from taking the EITC for 10 years if the credit is claimed but the taxpayer is later determined ineligible. This taxpayer was required to file an amended return. This same preparer lacked the knowledge to properly handle dividend income. This preparer also told the tester: "Oh, they are just forms. If I get \$4,000, I am not going to ask a lot of questions. I just want it!"²⁷

Two preparers failed to report qualified student grant funds as taxable income. Both preparers became confused about Form 1098-T, which reports scholarships, grants, and tuition payments from higher education institutions. In the case of the first tester, her scholarship amount exceeded the qualified expenses and therefore the tester was required to report some income from the scholarship. The preparer for the first tester asked her supervisor what to do, and the supervisor incorrectly responded that the tester didn't have to report the income.

The second tester had a 1098-T that listed \$662.65 in line 4 (adjustment from prior year). The preparer became confused and stated, "Technically I think I'm supposed to subtract \$662.65 from \$2,235, but I'm not sure. We can probably just leave it out because it's highly unlikely that IRS can track it."²⁸ Before completing the return she addressed the issue again, asking the taxpayer for permission to just ignore the \$662.65.

²⁶ Sarah Dewees and Shawn Spruce, First Nations Development Inst., *Tax Time Troubles: Mystery Shopper Testing Exposes Poor Quality Tax Preparation and Refund Anticipation Check Abuses*, Apr. 15, 2011, available at www.nmlegis.gov/lcs/handouts/IAC%20092412%20FNDI%20Taxtime%20Mystery%20Shopper.pdf.

²⁷ *Id.* at 22.

²⁸ *Id.* at 7.

Another tax preparer indicated she used her own bank account to receive direct deposits of taxpayers' refunds, which is prohibited under the IRS Code. I.R.C. § 6695(f). A tester asked this preparer what she did if someone could not afford to pay upfront. The preparer responded: "I just put my account number and routing number on the return and write the client a check when their refund comes in. I take my fee out before I write the check."²⁹

One tax preparer encouraged tax fraud by making up frivolous expenses for the Schedule A form. This preparer included numerous expenses for which taxpayers do not usually qualify for a deduction, *i.e.* clothing expenses, personal cell phones (calculated for 99% business use), and numerous commuter expenses that the taxpayer was not eligible to claim. She asked questions such as, "about how much did you spend on clothing?" and then recorded answers without asking for records of expenses. This same preparer told the tester, who was a tribal member, that he did not have to pay state income tax on income earned from employment not on his reservation, which was incorrect under New Mexico law.³⁰

Other problems included preparers who:

- Showed a lack of knowledge regarding how to properly file a Schedule C business return.
- Told a tester that federal employees do not pay Social Security taxes because they have a good retirement plan (this has not been the case since 1984).
- Didn't know how to handle paperwork associated with a rollover of a Roth IRA.

Finally, 5 of the 12 preparers did not provide a copy of the tax return to the testers at the time of signing, in violation of I.R.C. § 6107(a).

5. 2012 First Nations Development Institute (FDNI) Mystery Shopper Testing

In 2012, FDNI conducted 10 mystery shopper tests in communities near Native American reservations in New Mexico.³¹ Once again, this testing revealed poor quality service provided by tax preparers. Nine of the 10 testers encountered some issue when filing their taxes. FDNI concluded "[w]hile our sample of participants was small, the frequency of these errors calls into question how many Native American taxpayers, and moreover, how many taxpayers across the country are being overcharged and underserved by paid tax preparers."³²

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ Benjamin Marks, et al., First Nations Development Institute, *More Tax Time Troubles: Mystery Shopper Testing Exposes Refund Anticipation Loans in Reservation Border Towns*, 2012, available at www.nmlegis.gov/lcs/handouts/IAC%20092412%20FDNI%20Taxtime%20V3.pdf

³² *Id.* at 3.

In one example, an inexperienced preparer miscalculated the total refund for the tester. A FDNI staffer who accompanied the tester noted:

Unfortunately, I had completely assumed the preparer correctly listed the daughter as a dependent because she asked so many questions, so I didn't catch the omission until reviewing the return later. I ended up having to write a whole new paper return, changing the filing status to Head of Household and listing the daughter as a dependent. This raised the refund from \$55 to \$70... missing a dependent standing next to a taxpayer across your desk is probably inexcusable.³³

Since all of the testers were Native American, they potentially qualified for the New Mexico state exemption for this community. Yet several preparers skipped over this step. In one case — in which the tester was eligible for this exemption yet the preparer missed it — the tester had \$571 of state withholding from which she might have received some refund.

Finally, 6 of the 10 preparers did not provide a copy of the tax return to the testers at the time of signing, in violation of I.R.C. § 6107(a).

6. Impact Alabama Testing

Impact Alabama conducted mystery shopper tests of 13 tax preparers.³⁴ Testers described themselves to preparers as parents with one or two children who lived with them less than six months of the year, which would make them ineligible for the EITC.

The testing by Impact Alabama found that 11 of the 13 preparers nonetheless incorrectly claimed the EITC. In addition, 10 preparers did not report income from other jobs such as babysitting; nine preparers did not report interest income; and 11 allowed testers to claim “head of household” status without being qualified for it.

None of the testers should have qualified for refunds, yet each preparer calculated a refund ranging from \$65 to \$6,247. Five preparers calculated a refund of \$6,247 for a taxpayer who actually owed \$112 to the IRS. These five preparers included a fringe preparer (a finance company), a Mo' Money Taxes outlet, and three other independent preparers.

7. Testing by the Treasury Inspector General for Tax Administration (TIGTA)

In 2008, TIGTA testers conducted mystery testing of 28 paid preparers — 12 commercial chains and 16 independent preparers.³⁵ The TIGTA testers found that just 11 of the 28 preparers

³³ Id. at 17.

³⁴ Impact Alabama, *Impact Alabama Undercover Investigation of Commercial Tax Preparers in Alabama Results and Analysis*, Jan. 2009.

prepared an accurate tax return. The other 17 preparers prepared the returns incorrectly. Of these 17 preparers, 6 of 17 preparers produced returns that contained misstatements and omissions TIGTA considered to have been willful or reckless. These six preparers engaged in conduct such as adding or increasing deductions without the testers' permission — in some situations after the testers had questioned whether they were entitled to receive the deductions.

Examples included:

- When informed by the tester that s/he paid for babysitter expenses in cash, the preparer increased the child care expenses beyond what the tester stated s/he paid. In addition, the preparer instructed the tester to tell the babysitter to file a Schedule C with the inflated amount and deduct expenses for operating a home business equal to the inflated amount. The preparer also offered to change the expenses back to the original (real) amount if the babysitter did not agree to change his or her records. The preparer's actions increased the tester's refund by more than \$325.
- A tester completed an information worksheet showing children living in the home for less than one-half of the year. The preparer stated that he or she was going to show on the tax return that the children lived in the home with the tester for a full 12 months. The decision erroneously changed the tester's filing status from Single to Head of Household, increased the dependency exemptions, and qualified the tester for the Child Tax Credit and the EITC. The net effect was to increase the refund from \$100 to approximately \$6,000.
- Even though a tester informed the preparer s/he had no charitable contributions, the preparer included contributions on the return and did not inform the tester that they were being added. The preparer also added a deduction for property tax for a car without the tester's assertion or documentation. The effect was a refund of more than \$200, when the refund should have been less than \$140.

8. *Testing by the Government Accountability Office (GAO)*

In 2006, the GAO conducted mystery shopper tests of 19 paid preparers.³⁶ The GAO found errors in 17 out of the 19 tests, including preparers not reporting business income in 10 of 19 cases and claiming an ineligible child for the EITC in 5 out of the 10 applicable cases. These errors led to inflated refunds exceeding \$1,000 in 6 out of the 19 test cases.

³⁵ Treasury Inspector General for Tax Administration, *Most Tax Returns Prepared by a Limited Sample of Unenrolled Preparers Contained Significant Errors*, Reference Number: 2008-40-171, Sept. 3, 2008, available at www.ustreas.gov/tigta/auditreports/2008reports/200840171fr.pdf.

³⁶ Government Accountability Office, *Paid Tax Return Preparers: In a Limited Study, Chain Preparers Made Serious Errors*, GAO-06-563T, April 4, 2006, available at www.gao.gov/new.items/d06563t.pdf.

D. Abuses Uncovered by Government Enforcement Actions

Enforcement actions by the federal and state regulators have found numerous instances of fraud committed by preparers. Some of the most prominent actions include:

1. *U.S. Department of Justice (USDOJ) v. Jackson Hewitt*

A particularly notable tax fraud case was the civil enforcement action in April 2007 brought by the United States Department of Justice (USDOJ) against five Jackson Hewitt franchisees that operated 125 offices.³⁷ The USDOJ brought the civil enforcement action against the five Hewitt franchisees for preparing fraudulent tax returns that falsely claimed \$70 million in tax refunds. The USDOJ alleged that the owners and managers of these franchisees created and fostered an environment in which fraudulent tax return preparation was encouraged and flourished. Examples of fraud alleged by the USDOJ include filing false returns claiming refunds based on phony W-2 forms; using fabricated businesses and business expenses on returns to claim bogus deductions; claiming fuel tax credits in absurd amounts for customers clearly not entitled to any such credits; and massive fraud related to EITC claims.

2. *USDOJ v. Instant Tax Service*

The USDOJ filed a lawsuit against the owner of the tax preparation chain Instant Tax Service in March 2012.³⁸ The complaint alleged that Instant Tax franchisees intentionally prepared fraudulent tax returns to maximize customers' refunds in order to extract large tax preparation fees from these refunds. The USDOJ also alleged that Instant Tax Service issued guidance documents that encouraged franchisees "to lie to the IRS in the event of an audit."³⁹ The complaint states that the estimated tax losses from the allegedly fraudulent returns prepared in 2011 at Instant Tax locations in five cities exceeded \$16 million. After a two-week trial, a federal judge issued a permanent injunction banning Instant Tax Service and its owner, Fesum Ogbazion, from operating or being involved with any business related to tax preparation.⁴⁰

3. *Illinois v. Mo' Money Taxes*

The Illinois Attorney General's Office sued Mo' Money Taxes for filing tax returns without consumers' authorization, filing erroneous tax returns, and charging undisclosed and exorbitant

³⁷ See Complaint, *United States v. Smart Tax of Georgia, Inc.*, 1:07CV-0747 (N.D. Ga. Apr. 2, 2007); Complaint, *United States v. Smart Tax Inc.*, 07C-1802 (N.D. Ill. Apr. 2, 2007); Complaint, *United States v. Sofar, Inc.*, Civ. No. 2:07-cv-11460 (E.D. Mich. Apr. 2, 2007); Complaint, *United States v. Smart Tax of North Carolina, Inc.*, Civ. No. 5:07-cv-00125-FL (E.D.N.C. Apr. 2, 2007). All of the complaints are available at <http://www.usdoj.gov/tax/txdv07215.htm>.

³⁸ Complaint, *United States v. Fesum Ogbazion*, Civil No. 3:12-cv-95 (S.D. Ohio. Mar. 28, 2012).

³⁹ *Id.* at ¶¶ 27-28.

⁴⁰ *United States v. ITS Fin., LLC*, 2013 WL 5947222 (S.D. Ohio Nov. 6, 2013).

fees for tax preparation.⁴¹ The complaint alleged that Mo' Money used offers of RALs to lure consumers into providing their personal information, and signing a form that – unbeknownst to the consumer – gave Mo' Money the right to file tax returns on their behalf. Mo' Money would then file the consumers' tax returns and automatically deduct hundreds of dollars in undisclosed fees from their refunds – as much as \$700 per person. Many of these returns included incorrect information.

4. *Chicago Department of Business Affairs and Consumer Protection*

Investigators from this Chicago agency went undercover to investigate hundreds of tax preparers. They found more than 80 percent of the preparers investigated were in violation of new City ordinances governing them.⁴² One common violation was the failure to give consumers a required “Taxpayer Bill of Rights” and disclosure forms listing their services, the price for each service, and an estimate of the total charges. (The CBS news story also cites the case of a Chicago consumer whose return was filed by a tax preparer who did not have authorization to do so, and was even expressly told by the consumer not to file his return).

5. *New York Department of Taxation and Finance*

A 2008 sting operation by this New York state agency found evidence of fraud among about 40 percent of the 85 tax preparers it visited.⁴³ According to a news article about the sting, state officials were startled by the brazen nature of the fraud. In one case, a preparer told an undercover investigator: “I did not declare your full gross income from your business because you will pay a lot of taxes.”⁴⁴

E. Tax Preparation Fees

Another problem faced by taxpayers is the lack of transparency around tax preparation fees. Tax preparation is one of the few consumer services in the United States for which consumers often cannot obtain a price for the services before they incur them. Many tax preparers assert that they charge by the form and cannot predict which forms will be generated until they actually

Mystery shopper testing has documented tax preparation fees up to \$500.

⁴¹ See Complaint, *People v. Mo' Money Tax Service*, Civil Ac. No. 12CH09136 (Cook Cty Cir. Ct. Mar. 14, 2012).

⁴² Pam Zekman, “2 Investigators: Tax Preparers May Be Ripping You Off”, CBS Chicago, Feb 4, 2013, available at <http://chicago.cbslocal.com/2013/02/04/2-investigators-tax-preparers-violating-city-consumer-laws/>.

⁴³ See Press Release, New York Department of Taxation and Finance, “Wall Street Journal Story Highlights Department's Efforts To Expose Crooked Tax Preparers”, Dec. 4, 2008.

⁴⁴ See Tom Herman, “New York Sting Nabs Tax Preparers”, *Wall Street Journal*, Nov. 26, 2008.

finish the tax preparation. Thus, consumers cannot comparison shop or predict how much tax preparation will cost them.⁴⁵

As a result of this lack of transparency, low-income consumers face tax preparation fees that are already very high, and, in many instances, inflated. Mystery shopper testing has documented preparation fees up to \$400 or \$500. There are numerous examples of preparers giving low-ball estimates on preparation fees or even refusing to provide testers with a quote.⁴⁶ The U.S. Department of Justice's lawsuit against Instant Tax Service is the latest example of these types of abuses. The USDOJ alleged that:

Collectively, Instant Tax Service's tax preparation and junk fees⁴⁷ typically average more than \$400–\$500, and sometimes run as high as \$1,000 for as little as 15 minutes of tax return preparation. Because Instant Tax Service deliberately targets low-income taxpayers, these unconscionably high fees often pose a significant financial hardship for their customers Frequently, franchisees also fail to disclose all fees, or they tell customers that they charge one amount for fees and then later increase the fees without the customer's knowledge or consent.⁴⁸

The Illinois Attorney General's lawsuit against Mo' Money Taxes is another example of abuses in tax preparation fees.

Mo' Money Taxes advertised that the cost of their services would be between \$150 and \$350....In fact, Mo' Money Taxes charged consumers between \$480 and \$550 to prepare and file their returns, and charged them additional fees totaling \$178 for processing the returns....As a result, consumers were typically charged over \$700 in fees for preparing, filing, and processing their tax return.⁴⁹

The ability to deduct tax preparation fees from a tax-time financial product, such as a refund anticipation check (RAC) or refund anticipation loan (RAL), compounds this problem, as it makes taxpayers less sensitive to the price of preparation. Normally, a merchant's refusal to provide price information might discourage a consumer from buying a product. However, since the fee is deducted from the financial product, consumers may not be as sensitive to this

⁴⁵ See David Rothstein, Policy Matters Ohio, Improving Tax Preparation With a Model Fee Disclosure Box, June 2013, available at www.policymattersohio.org/wp-content/uploads/2013/06/FeeDisclosure_Jun2013.pdf; Chi Chi Wu and Jean Ann Fox, NCLC and Consumer Federation of America, *The Party's Over for Quickie Tax Loans: But Traps Remain for Unwary Taxpayers*, 14-16 (Feb. 2012), available at <http://www.nclc.org/images/pdf/pr-reports/report-ral-2012.pdf>.

⁴⁶ See *id.* at 17.

⁴⁷ These "junk fees" were the add-on fees often associated with refund anticipation checks and loans, such as "data and document storage," "administrative," "e-filing," "service bureau," "transmission," or "processing" fees.

⁴⁸ Complaint, *United States v. Fesum Ogbazion*, Civil No. 3:12-cv-95 (S.D. Ohio. Mar. 28, 2012), ¶¶ 33-34.

⁴⁹ Complaint, *People v. Mo' Money Tax Service*, Civil Ac. No. 12CH09136 (Cook Cty Cir. Ct. Mar. 14, 2012), ¶¶ 79-81.

lack of pricing information. Furthermore, mystery shopper testing has found that the tax preparation fee is often lumped together with the fee for the RAC/RAL and other junk fees, so that it is impossible to tell how much a consumer paid for each item.⁵⁰ Some tax preparers subjected to mystery shopper testing were even reluctant to provide a breakdown of the fees when asked.⁵¹

Clearly, there is a need for reforms in the disclosure of tax preparation fees. As part of any tax preparer regulation, preparers should be required to provide a clear, simple disclosure of tax preparation fees to consumers before beginning the process of tax preparation. This disclosure should be in a tabular format, similar to the disclosure table that accompanies credit card applications and solicitations.

⁵⁰ See 2011 Mystery Shopper Testing Report at 5-6; 2010 Mystery Shopper Testing Report at 9; See also Sara Dewees, First Nations Development Institute, *Tax Time Troubles: Mystery Shopper Testing Exposes Poor Quality Tax Preparation and Refund Anticipation Check Abuses*, Apr. 15, 2011, at 14, 24.

⁵¹ See 2011 Mystery Shopper Testing Report at 5; 2010 Mystery Shopper Testing Report at 9.

The following table provides examples of the different tax preparation fees documented by mystery shopper studies and other sources.

Table of Tax Preparation Fees

Source	Location	Range of Tax Prep Fee	Range of Total Fees (inc. RALs, RACs and Related Fees)
US Dept of Justice v. Instant Tax Serv. (2012)	Multiple states	----	\$400 – over \$1000
Illinois AG v. Mo’ Money Taxes (2012)	Illinois	\$480 - \$550	\$658 - \$728
Consumer Groups 2008 Testing	North Carolina (Durham)	\$75 - \$355	\$75 – \$502
	Pennsylvania (Philadelphia)	\$60 - \$298	\$148 - \$487
Consumer Groups 2010 Testing	Arkansas	\$79 - \$396	\$224 - \$487
	North Carolina (Durham)	\$195 - \$275	\$343 - \$388
	New York (New York City)	\$40 - \$443	\$40 - \$497
Consumer Groups 2011 Testing	North Carolina (Durham)	\$64 - \$320	\$69 - \$466
	New York (New York City)	\$143 - \$540	\$100 - \$570
First Nations Dev. Inst. 2011 Testing	New Mexico (towns bordering Native American reservations)	\$48 - \$308	Same
First Nations Dev. Inst. 2012 Testing	New Mexico (towns bordering Native American reservations)	\$55 - \$1,318	Same
Treasury Inspector General(2008)	Not disclosed	\$60 - \$402	-----

F. Why Regulation Is Needed and Enforcement Actions Alone Are Not Adequate

The massive amount of fraud, incompetence, and abuse in the tax preparation industry is astounding. Just a handful of limited mystery shopper tests have consistently uncovered numerous instances of these problems, indicating that such problems are widespread and common in the tax preparation industry. This is not an anomaly or a handful of bad apples. There is an enormous level of incompetence and corruption across the entire industry. The IRS regularly ranks “preparer fraud” highly among its “Dirty Dozen Tax Scams.”⁵²

Bringing enforcement actions on a one-by-one basis is simply inadequate as a response to this problem. While it would get rid of a few bad actors, relying on enforcement alone ignores tens of thousands of other violators. It is akin to only treating a skin lesion when the related disease has invaded a patient’s entire body.

Protecting individual taxpayers and the federal and state treasuries from this massive fraud and abuse demands some basic fundamental standards. It calls for establishing baseline considerations for the practitioners who handle consumers’ most sensitive information. It is only common sense to require commercial preparers to obtain basic training, pass competency exams, and seek continuing education to stay current on ever-changing tax laws.

It is only common sense to require commercial preparers to obtain basic training, pass competency exams, and seek continuing education to stay current on ever-changing tax laws.

G. The Model Tax Preparer Regulation Act

To assist states in developing a system to regulate tax preparers, the National Consumer Law Center (NCLC) has developed text for a Model Act for the regulation of tax preparers (see Appendix B). This Model Act is based in large part upon the laws of three of the four states that currently regulate paid tax preparers – Maryland, Oregon, and California⁵³ – as well as the IRS regulations that were invalidated as being outside the IRS’s authority.⁵⁴ It combines the best elements of these laws with some additional provisions for administrative and private relief.

⁵² See, e.g., IRS, *IRS Releases the Dirty Dozen Tax Scams for 2013*, Mar. 26, 2013.

⁵³ The fourth state to regulate tax preparers was New York. New York’s regulations governing preparers were finalized in December 2013, after the Model Act had been already drafted in November 2013.

⁵⁴ Note that the D.C. Court of Appeals invalidated the IRS regulations solely on the basis that they were outside the scope of the IRS’s authority as an administrative agency, and not for any deficiencies in the regulations themselves. See *Loving v. I.R.S.*, ---F.3d ---, 2014 WL 519224 (D.C. Cir. Feb. 11, 2014). Obviously, the issue of the scope of administrative authority is not a problem for a state legislature that is enacting a new law.

The Model Act consists of three core components that require all paid tax preparers to:

- Obtain a registration from the designated state agency unless they fit into one of the handful of exceptions, such as certified public accountants.
- Pass a basic competency exam to demonstrate their knowledge of tax law and practice.
- Have 60 hours of initial education and 15 hours per year of continuing education courses on tax law, theory, and practice.

In addition, the Model Act has provisions requiring preparers to provide a standardized disclosure of their fees. This addresses the problem with the opacity of tax preparation fees discussed in section E.

The Model Act can be combined with another model statute available from NCLC that regulates preparers who broker or “facilitate” tax-time financial products, particularly refund anticipation loans and refund anticipation checks. This model statute, the Model Refund Anticipation Loan Act, is available at www.nclc.org/ralmodel.

APPENDIX A

Number of Taxpayers Using Paid Tax Preparers by State: All Taxpayers and Earned Income Tax Credit (EITC) Recipients, 2012 Filing Season*

Prepared by: David Rothstein

State	All Taxpayers Using Paid Tax Preparers	EITC Recipients Using Paid Tax Preparers	State	All Taxpayers Using Paid Tax Preparers	EITC Recipients Using Paid Tax Preparers
Alabama	1,136,014	344,763	Montana	245,370	41,769
Alaska	131,475	19,747	Nebraska	467,520	72,807
Arizona	1,211,980	290,017	Nevada	617,024	134,692
Arkansas	687,223	196,969	New Hampshire	275,887	33,803
California	9,322,740	2,012,856	New Jersey	2,519,495	386,657
Colorado	1,036,745	176,822	New Mexico	405,323	118,788
Connecticut	861,035	110,383	New York	5,563,726	1,189,552
Delaware	188,136	31,882	North Carolina	2,058,602	518,330
D.C.	127,905	28,899	North Dakota	191,722	22,149
Florida	4,309,023	1,179,708	Ohio	2,587,913	459,545
Georgia	2,091,223	633,150	Oklahoma	800,432	191,493
Hawaii	305,253	56,275	Oregon	717,513	114,678
Idaho	320,151	65,267	Pennsylvania	3,042,438	487,453
Illinois	3,212,236	592,843	Rhode Island	284,904	50,807
Iowa	876,383	126,218	South Carolina	1,085,418	304,056
Indiana	1,524,159	290,878	South Dakota	211,211	34,638
Kansas	683,990	114,690	Tennessee	1,395,897	377,177
Kentucky	1,057,482	256,616	Texas	5,050,685	1,526,477
Louisiana	1,015,970	314,580	Utah	514,275	95,555
Maine	277,806	45,109	Vermont	143,393	21,018
Maryland	1,284,888	217,216	Virginia	1,583,776	302,113
Massachusetts	1,656,019	222,792	Washington	1,218,745	189,921
Michigan	2,441,836	459,016	West Virginia	375,272	81,335
Minnesota	1,318,081	182,758	Wisconsin	1,406,687	199,383
Mississippi	688,763	251,909	Wyoming	133,901	18,423
Missouri	1,397,507	285,595			

Source: Brookings Institution Interactive EITC Database, accessed 11/14/2013:

<http://www.brookings.edu/research/interactives/eitc>

*Most recent data available (for Tax Year 2011 returns filed in 2012).

Notes: Some paid tax preparers are regulated under existing IRS guidance. These include Enrolled Agents (EAs) and Certified Public Accountants (CPAs). The above data includes returns prepared by both EAs, CPAs, and unregulated preparers. However, we believe the majority of individual taxpayers are likely to be using unregulated preparers. Furthermore, the vast majority of EITC returns are likely prepared by unregulated preparers

APPENDIX B

MODEL INDIVIDUAL TAX PREPARER REGULATION ACT

with Commentary
National Consumer Law Center
November 2013

SUBTITLE 1. SCOPE; DEFINITIONS

Section 1. **Title and scope.**

(a) Title. This Act shall be known and cited as the "Individual Tax Preparer Regulation Act." This Act shall be liberally construed to effectuate its purpose. The purpose of the Act is to ensure that paid tax preparers have the knowledge and expertise to provide advice and assistance to taxpayers in a competent and ethical manner, and to protect taxpayers as consumers when purchasing tax preparation services.

(b) Scope. No person (including any officer, agent, employee or representative) may individually, or in conjunction or cooperation with another person, provide individual tax preparation services unless the person has complied with the provisions of this Act. The provisions of this Act shall apply to any person who seeks to evade its applicability by any device, subterfuge, or pretense whatsoever.

Commentary

Subsection (a) sets the stage for the remainder of the Act by clearly announcing that the legislature intends that the Act be liberally construed to effectuate its purpose and is a consumer protection law. Subsection (a) also enunciates the Act's specific purpose.

Subsection (b) defines a broad scope of coverage for the Act, and makes clear that the scope includes those who attempt to evade the Act. These directives will give guidance to the courts when the Act's provisions are applied and interpreted.

Section 2. **Definitions.**

The following definitions apply in this Act:

(a) "Applicant" shall mean a person who applies for registration as a tax preparer.

(b) "Board" shall mean [the state board or agency responsible for enforcing this Act].

(c) “Consumer” shall mean any natural person who, singly or jointly with another consumer, files a federal or state personal income tax return.

(d) “Registered preparer” means an individual who has been issued a registration by the Board to provide individual tax preparation services.

(e) “Provide individual tax preparation services” means to prepare, advise, or assist in the preparation of, or assume final responsibility for another person’s preparation of, a federal or state personal income tax return of a consumer for valuable consideration.

(g) “Registration” means, unless the context requires otherwise, an authorization issued by the Board to provide individual tax preparation services.

Commentary

There are a number of critical definitions in the Act:

(b) “Board” is the state agency charged with the responsibility of enforcing the Act. It can either be an existing Board that is responsible for licensing occupations or can be a newly established Board. If newly established, Optional Section 3.A contains model language for the Board composition.

(c) “Consumer” essentially means a taxpayer who is a natural person, i.e., an individual, who files a personal income tax return. Thus, this Act does not apply to tax preparation for corporations or other entities that are not natural persons.

(e) “Provide individual tax preparation services” is limited to provision of tax preparation services for (1) a consumer and (2) for compensation. This definition excludes tax preparation services provided to corporations or other entities that are not natural persons. This definition also excludes tax preparation services that are provided without compensation, such as preparation by a volunteer or uncompensated preparation for family members. However, the definition does include tax preparation services where the preparer receive indirect compensation, such as preparation services that are provided in connection with the sale of goods or services (including a loan or other financial services), for which the consumer pays.

Section 3. Exemptions.

The following individuals are exempt from the requirements of this Act:

(a) an individual in good standing with an active license issued by [the board that licenses accountants, such as a state Board of Public Accountancy] or a comparable licensing authority in another state;

(b) an individual in good standing and admitted to practice law in the state or in another state;

(c) an individual employed by a local, state, or federal governmental agency but only in performance of official duties;

(d) an individual enrolled to practice before the Internal Revenue Service who is governed under Circular 230; or

(e) an employee or volunteer of a Volunteer Income Tax Assistance program.

Commentary

This Model Act follows the Maryland structure, which requires each individual tax preparer to be registered. It does not provide for a corporate registration, such as that found in Oregon law. The intent of this Model Act is to ensure that every single individual who prepares taxes for a consumer for compensation has the adequate knowledge and competency to do so.

Like both the Maryland and Oregon laws, the Model Act contains a number of exemptions for individuals who are already subject to licensing or registration and presumably have competency to prepare taxes. These exemptions include attorneys, certified public accountants and “enrolled agents” who are governed by IRS Circular 230. The exemptions also include government employees, such as IRS or state taxing agency employees, who sometimes may assist consumers with the preparation of their returns. Finally, this section exempts employees of a Volunteer Income Tax Assistance (VITA) site. VITA sites have long followed fundamental training and certification requirements. See IRS, Pub. 1084 - IRS Volunteer Site Coordinator’s Handbook 29 (Oct. 2012)(requiring that all “[v]olunteer preparers must pass at least the basic certification test. A minimum score of 80% is required for each certification test”).

The Maryland law has one additional exemption not in in the Model Act, for employees or assistants of registered preparers or exempted individuals. If such an exemption is desired, the following language may be used to exempt them:

(6) an individual serving as an employee of or assistant to a registered tax preparer or exempted person in the performance of official duties for the registered tax preparer or exempted person, so long as :

(a) such individual provides services and is located in the same physical office as the registered tax preparer or exempted person;

(b) the registered tax preparer or exempted person directly supervises and oversees the work of such individual; and

(c) such individual is employed by the registered tax preparer or exempted person, or such individual and the registered tax preparer or exempted person are both employed by the same entity.

This is similar to the Maryland exemption. However, the Model Act adds additional requirements for this exemption, to ensure that the employee or assistant works in the same physical office and is directly supervised by a registered preparer or exempted person. These additional requirements are intended to prevent creating a loophole for certain fringe preparers who might claim that a third-party vendor that provides them with software and back office services is the “registered preparer,” and they are merely assistants for the vendor. These arrangements between fringe providers and the third-party vendors they rely upon are discussed in Section B of the accompanying report.

SUBTITLE 2. BOARD ESTABLISHMENT; POWERS

Optional Section 3A. **Establishment of a Board**

(a) There is established a state Board of Individual Tax Preparers.

(b) The Board consists of seven members of which:

- (1) six shall have at least 5 years of tax preparation experience; and
- (2) at least one shall be a member of a nonprofit tax program or nonprofit consumer advocate program.

(c) The Governor shall appoint the members with the advice of [appropriate state officials].

(d) Members of the following groups shall be considered for membership on the Board:

- (1) a member of a nonprofit tax program or nonprofit consumer advocate program;
- (2) a commercial individual tax preparer who has been in practice in the state for more than 5 years;
- (3) a member of the state association of certified public accountants;
- (4) a member of the state society of accountants;
- (5) a member of the state bar association; and
- (6) a member of the National Association of Enrolled Agents.

(e) Each member of the Board shall be:

- (1) a citizen of the United States; and
- (2) a resident of the state.

(f) The term of a member begins on July 1 and shall be four years, except that the terms of initial members shall be staggered as follows: three members shall serve four years, two members shall serve three years and two members shall serve two years.

(g) At the end of a term, a member continues to serve until a successor is appointed. A member who is appointed after a term has begun serves only for the rest of the term and until a successor is appointed.

(h) Each member of the Board is eligible for reappointment but may not serve more than two consecutive terms.

(i) The Governor (1) may remove a member for incompetence, misconduct, neglect of duties, or other sufficient cause; and (2) shall remove a member who ceases to meet the requirements under which the member was appointed, as provided under subsections (b) and (c) of this section.

(j) From among its members, the Board shall elect a chair and other officers as necessary. The manner of election and the term of an officer shall be as the Board determines.

(k) A majority of the members then serving on the Board is a quorum.

Commentary

This section is optional, as a state may choose to place the Board's duties in an existing agency instead of creating a new agency. This section provides a potential structure if the choice is made to create a new agency. It is primarily derived from the Maryland law, with some modification.

The Model Act contemplates that the operations of the Board and the administration of the Act will be funded by fees paid by preparers, so will be budget-neutral. The Maryland law also includes provisions to create a special fund that receives payment of the fees for registration, examination and renewals, and ensures that such fees are used for the Board's operation. Provisions along these lines may be useful to ensure that the preparer registration program has sufficient funding to operate properly.

Section 4. Powers of the Board

(a) The Board shall adopt rules of professional conduct as appropriate to establish a high standard of integrity and dignity for the practice of providing individual tax preparation services.

(b) The Board shall establish the amount of any fees, including fees for registration, renewal of registration, and for administering the examination described in Section 6.

(c) The Board shall maintain a list of all registered preparers to whom the Board has issued a registration.

(d) The Board shall maintain records of all complaints it receives regarding registered preparers and individuals engaged in providing individual tax preparation services without a registration.

(e) The Board may adopt any rules as it believes are necessary or appropriate to effectuate the purpose of this Act, to provide for the protection of taxpayers or the federal or state treasury, and to assist preparers in interpreting this Act.

Commentary

This section sets forth a number of required duties of the Board, including establishing rules of professional conduct, setting the amount of required fees, maintaining a list of registered preparers, and maintaining a record of all complaints regarding registered preparers and preparers illegally operating without a registration. These duties are necessary for the proper functioning of the Board and the registration system, and many of them are based in large part on Maryland's law.

This section also provides the Board with broad regulatory authority to establish any regulations to implement the Act. Issues will often arise after a statute is passed requiring interpretation, refinement or additional provisions. An administrative agency such as the Board is in the best position to respond to such issues, as it will have the experience and expertise to draft sound regulations that balance the interests of the regulated industry, consumers, and the public.

SUBTITLE 3. REQUIREMENTS FOR REGISTRATION AND RENEWAL

Section 5. Qualifications for Registration

No individual may provide individual tax preparation services unless the individual has been issued a registration by the Board. To qualify for a registration, the applicant must:

- (a) be of good character and reputation;
- (b) be at least 18 years old;
- (c) possess a high school diploma or have passed an equivalency examination;
- (d) present evidence satisfactory to the Board that the applicant has successfully completed at least 60 hours in basic personal income tax law, theory and practice at a qualified education provider pursuant to Section 9 or other institution approved by the Board;

(e) possess a preparer tax identification number issued by the Internal Revenue Service; and

(f) pass either:

- (1) an examination developed and administered by the Board pursuant to Section 6; or
- (2) an examination administered by the Internal Revenue Service intended to test the competency of tax preparers [along with the an examination administered by the Board solely regarding state tax law].

Commentary

This section sets the minimum requirements for an individual to apply for registration. Each of these requirements is based on requirements found in state laws or the IRS regulations. The requirement that an individual be of good character and reputation is found in Maryland's law. The requirements that the individual be over 18 years old and have a high school education are found in both the Maryland and Oregon laws (the IRS regulations also require that the individual be over 18 years old).

The requirement for 60 hours of education in tax law, theory and practice is based on Oregon's law. The requirement to have a preparer tax identification number (PTIN) is of course an IRS requirement, which the Oregon law has also adopted as a requirement.

The requirement to pass a competency examination is based on the IRS regulations, as well as Maryland and Oregon's laws. This section provides alternatives for applicants, permitting them to obtain a registration based on either the IRS examination or a state examination developed by the Board. This section also provides optional language in case there is a desire to require an examination of solely state tax law issues in cases where the applicant chooses to take the IRS examination.

Section 6. Examinations

(a) The Board shall give examinations to applicants at least twice a year, at the times and places that the Board determines. However, the Board may give fewer examinations if the number of applicants seeking to take the examination since the last examination administered by the Board is less than 10 individuals.

(b) The Board shall develop examinations that measure the applicant's knowledge of federal and state personal income tax law, theory, and practice.

(c) The Board shall give each qualified applicant notice of the time and place of examination.

(d) The Board shall adopt regulations that establish the passing score for an examination.

(e) The Board shall notify each applicant of the applicant's examination score.

Commentary

This section sets forth the requirements for the competency examination that the Board will administer as an alternative to the IRS examination (or as the sole competency examination if the IRS is not administering exams). It is based in large part on the Maryland and Oregon laws. The procedural requirements are based on Maryland law, while the requirements regarding the examination's contents are based on Oregon law

The section requires the Board to administer the examination twice per year, but allows the Board to skip this requirement if too few applicants seek to take the state examination. Since the law allows applicants to take the IRS examination as an alternative, if the IRS is administering them, there is a possibility that almost all of the applicants will seek to take that examination instead of a state version. This provision allows the Board to skip administering the examination in those circumstances.

Section 7. Registration procedures

- (a) An applicant for a registration shall submit to the Board an application on a form that the Board shall establish.
- (b) If an applicant qualifies for a registration under this Act, the Board shall send the applicant a notice that states that:
 - (1) the applicant has qualified for a registration; and
 - (2) on receipt of a registration fee set by the Board, the Board will issue a registration to the applicant.
- (c) On payment of the registration fee, the Board shall issue a registration to each applicant who meets the requirements of this Act.
- (d) Unless a registration is renewed as provided in Section 10, the registration shall be valid for a period ending on the last day of the month that is two years from when the registration was issued.

Commentary

This section sets out the actual procedures for registration. It also provides that registrations shall be valid for essentially two years. However, it provides that registrations shall expire at the end of the month of this two-year period. This allows the Board to process renewals at the end of the month instead of a daily basis, simplifying the administrative burden on the Board.

Section 8. **Bond**

(a) Each registered preparer must post a bond in the amount of \$10,000 (to be increased every five years based proportionally on changes in the Consumer Price Index, with amounts rounded to the nearest hundred dollars). This bond must continue in effect for five (5) years after the registered preparer ceases operation in the state.

(b) The bond required by this section shall be in favor of, and payable to, the state and shall be for the benefit of any consumer damaged by any fraud, dishonesty, misstatement, misrepresentation, deceit, violation of this Act, or any unlawful acts or omissions by a registered preparer [, or any employee or assistant of the registered preparer. The registered preparer filing the bond shall identify all employees or assistants, and all such employees or assistants shall be covered by the bond of the registered preparer.].

(c) The registered preparer shall file an amendment to the bond within 30 days of a change in information contained in the bond [, including a change in the employees or assistants of the registered preparer].

(d) A registered preparer may not conduct business without having the bond in the amount prescribed by this section.

(e) Thirty days prior to the cancellation or termination of any bond required by this section, the issuer of the bond shall send a written notice of that cancellation or termination to the registered preparer and the Board, identifying the bond and the date of cancellation or termination.

(f) If a registered preparer fails to obtain a new bond by the effective date of the cancellation or termination of the former bond, the registered preparer shall cease to conduct business until a new bond is obtained.

Commentary

This section requires each registered preparer to post a bond in the amount of \$10,000 that can be used to pay damages and penalties to consumers harmed by any violations of the Act. There is also optional language if the state opts to exempt employees and assistants of registered preparers in Section 3, so that the bond also applies to any misconduct by these individuals.

This bond requirement is based on California's law, which has a similar bond requirement. To prevent dilution of the bond requirement by inflation, this section requires that the bond requirement be increased every five years based on the Consumer Price Index.

The bond is important because it provides a source of compensation to consumers harmed by violations of the Act, such as fraud by the registered preparer that results in penalties imposed on the consumer.

Without this protection, registered preparers could shut down their businesses and leave nothing from which a consumer could satisfy a judgment obtained due to the illegal acts of the preparer.

Section 9. Continuing Education

(a) Every registered preparer shall complete at least 15 hours of continuing education every year. Two (2) hours of continuing education must specifically address the topic of professional conduct.

(b) The Board shall adopt regulations to implement the continuing education requirements of subsection (a). These regulations shall:

- (1) establish minimum requirements for continuing education providers to ensure they include information about changes in tax law, regulation, procedure, as well as the current trends in federal and state tax preparation services;
- (2) ensure that programs approved for compliance with the continuing education requirements are available at reasonable intervals throughout the state; and
- (3) provide registered preparers with options by which to obtaining continuing education through a variety of programs, which may include:
 - (i) professional development programs;
 - (ii) technical sessions of professional societies or chapters;
 - (iii) college courses approved by the Board;
 - (iv) seminars provided by governmental units, including the Board; and
 - (v) other seminars or symposiums related to tax preparation services.

(c) The Board may enter into written agreements with qualified education providers wishing to conduct approved programs. A person seeking approval by the Board for this purpose shall:

- (1) submit to the Board an application on the form that the Board provides; and
- (2) pay an application fee, as set by the Board.

(f) A registered preparer may obtain qualifying hours to fulfill the requirements of subsection (a) from a qualified continuing education provider registered with the Internal Revenue Service.

Commentary

The Model Act requires that registered preparers take continuing education courses so that they stay current with changes in federal and state tax law. Both the IRS regulation and the Maryland and Oregon laws include a provision for continuing education, and this section of the Model Act is based on a combination of them.

The 15 hour requirement is based on the IRS regulations. However, this Section adds a requirement, similar to that required by many state bar agencies, that 2 hours of the 15 specifically focus on ethics or professional conduct issues.

This section requires the Board to issue regulations that result in registered preparers having sufficient options to meet the continuing education requirements. These provisions are based on Maryland's law. This section also provides that any continuing education hours obtained from an education provider registered with the IRS shall be counted toward the state continuing education requirements.

Section 10. Renewal of registration

(a) At least one (1) month before a registration expires, the Board shall mail to the individual, at the last known address of the individual:

- (1) a renewal application form, as established by the Board; and
- (2) a notice that states: (i) the date on which the current registration expires; and (ii) the date by which the Board must receive the renewal application for the renewal to be issued and mailed before the registration expires; and (iii) the amount of the renewal fee.

(b) A registered preparer may renew a registration for an additional 2-year term if the individual is entitled to be registered and, before the date established in subsection (a)(2)(ii):

- (1) pays to the Board a renewal fee, as set by the Board;
- (2) submits to the Board a renewal application which has been deemed satisfactorily completed by the Board; and
- (3) submits to the Board evidence deemed satisfactory to the Board of compliance with the continuing education requirements set forth in Section 9 and the bond requirements of Section 8.

(c) The Board may restore any lapsed registration upon payment to the Board of all past unpaid renewal fees and a fee for restoration of a lapsed registration as set by the Board pursuant to Section 4 and upon proof of compliance with the continuing education requirements set forth in Section 9 and the bond requirements of Section 8.

Commentary

This section provides for renewal of licenses. It is based on a combination of the Maryland and Oregon laws. It places the burden on the Board to notify registered preparers when they need to renew, and in turn requires the preparers to complete the renewal application satisfactorily and to demonstrate that they have complied with the continuing education and bond requirements of the Act.

There is a provision for restoration of lapsed licenses, which requires proof of compliance with the requirements for renewal and fees for both unpaid renewals and for restoration. It is based in large part on a provision in Oregon's law.

SUBTITLE 4. DISCLOSURES; PROHIBITIONS

Section 11. **Disclosures**

Prior to providing any individual tax preparation services, a registered preparer must provide the consumer with the following:

(a) A written disclosure consisting of:

- (1) the registered preparer's name, address, telephone number, and PTIN from the IRS;
- (2) that the registered preparer is not a certified public accountant, an enrolled agent, or a tax attorney;
- (3) a list or description of the services that the registered preparer is qualified to provide; and
- (4) the registered preparer's education and training, including examinations taken and successfully passed.

(b) A written disclosure of fees for individual tax preparation services that contains the following information:

- (1) a list of, description of, and the fee for each tax preparation service offered by the tax preparer, including fees for the preparation of individual forms;
- (2) a list of, description of, and price of all miscellaneous fees associated with registered preparer's tax preparation services, including filing fees and processing fees; and
- (3) an estimate of the total charge to the consumer based upon the tax preparation services the consumer has selected to purchase.

The disclosure required by this subsection shall be in the form of a table, as prescribed by the Board by regulation, and which shall contain clear and concise information regarding each item required to be disclosed along with appropriate headings for each such item.

(c) The Board shall develop and publish a Model Disclosure Form to implement the requirements of subsection (b). A registered preparer must make the disclosures required by subsection (b) using a format substantially similar to the Model Disclosure Form.

(d) The Board may by regulation require such additional disclosures as it believes are necessary or proper to effectuate the purposes of this Act.

(e) The registered preparer must orally review the disclosure required by subsection (b)(3) with the consumer before the preparer renders any individual tax preparation services to the consumer. No individual tax preparation services shall be rendered to any consumer until the registered preparer has reviewed this information.

Commentary

This section mandates the required disclosures that a registered preparer must make to consumers before providing individual tax preparation services. The first subsection involves disclosures about the registered preparer and is based on Maryland’s law. The second subsection requires disclosures of tax preparation fees, and is partly based on an ordinance issued by the City of Chicago. This requirement addresses the serious problem discussed in Section E of the accompanying report concerning the lack of transparency around tax preparation fees.

This section modifies the requirements of the City of Chicago’s ordinance by requiring that the disclosures be in the form of a tabular format. This is an idea derived from the Truth in Lending Act’s requirement for a table to accompany credit card applications, sometimes known as the “Schumer Box” after its lead sponsor in the House of Representatives. A sample of a table format would be:

Figure 2	
Proposed tax preparation fee box	
Service	Cost (examples)
1040 EZ return	--
Basic 1040 return	\$150.00
• Schedule A (itemized deductions)	--
• Schedule B (interest and dividends)	--
• Schedule C-EZ (self-employment)	--
• Schedule C (self-employment)	--
• Schedule EIC (earned income credit)	\$50.00
• Other Schedules (list as needed)	--
State return	\$50.00
Local return	\$25.00
Total preparation fees	\$275.00
Processing fees	
• Document storage and copying	\$25.00

Filing fees	
• Electronic filing and acknowledgement	\$30.00
• Paper filing	--
Additional fees	
• Tax refund loan	--
• Tax refund check	\$30.00
• Audit protection	\$25.00
• Return review	--
• Tax planning and research	--
• Third party fees from bank or servicer	--
Total fees	\$110.00
Refund options	
• Direct deposit to a bank account	--
• Split refund (Form 8888)	--
• U.S. Savings Bond	--
Total Preparation Cost	\$385.00
<i>Questions? Call xxx-xxx-xxxx</i>	

Taken from: David Rothstein, Policy Matters Ohio, Improving Tax Preparation With a Model Fee Disclosure Box, June 2013

Section 12. Prohibited Acts

(a) Unless the person has obtained a registration from the Board and otherwise complied with the provisions of this Act, no person (including any officer, agent, employee or representative) may individually or in conjunction or cooperation with another person:

- (1) provide, or attempt to provide, individual tax preparation services; or
- (2) represent to the public, by use of a title, including "registered individual tax preparer" or "individual tax preparer," by description of services, methods, or procedures, or otherwise, that the individual is authorized to provide individual tax preparation services in the state.

(b) No registered preparer [(including any employee or assistant)] may, individually or in cooperation, with another person:

- (1) make, or authorize the making of, any statement or representation, oral or written or recorded by any means, which is intended to induce persons to use individual tax preparation services, which statement or representation is fraudulent, untrue, or misleading;
- (2) obtain the signature of a consumer to a tax return or authorizing document which contains blank spaces to be filled in after it has been signed;
- (3) fail or refuse to give a consumer, for his or her own records, a copy of any document requiring the consumer's signature, immediately after the consumer signs the document, or if individual tax preparation services are provided by internet or mail, by sending a copy by electronic means or postal mail that same day;
- (4) fail to maintain a copy of any tax return prepared for a customer for four years from the date of completion or the due date of the return, whichever is later;
- (5) engage in advertising practices which are fraudulent, untrue, or misleading;
- (6) violate Section 7216 of Title 26 of the United States Code or its implementing regulations, or counsel or assist another to do so;
- (7) violate the [state tax code] or its implementing regulations, or counsel or assist another to do so;
- (8) fail to sign a consumer's tax return when the consumer has made payment to the tax preparer for individual tax preparation services;
- (9) fail to return, upon the demand by or on behalf of a consumer, records or other data provided to the tax preparer by the consumer;
- (10) knowingly give false or misleading information to the consumer or the Board;
- (11) violate this Act; or
- (12) engage in any other action prohibited by the code of professional conduct or other regulations promulgated by the Board.

(c) Each violation of this section constitutes a separate offense.

(d) Any waiver by a consumer of any provision of this Act shall be deemed null, void and of no effect.

Commentary

This section lists what acts are prohibited for both registered preparers and preparers who fail to obtain a registration. It is primarily based on a combination of the California and Oregon laws.

The list of prohibited acts in this section is crucial to protecting consumers from abusive behavior. The most important prohibited act is subsection (a), which prohibits individuals from providing or attempting to provide individual tax preparation services without a registration. This is a prohibition in all of the state laws, as well the IRS regulations.

Several other protections are critical, including the prohibitions against:

- *Inducing consumers to sign tax forms containing blank spaces;*
- *Failing or refusing to give a consumer a copy of his or her tax return or other document requiring his or her signature;*
- *Violating the Act or any regulations issued under the Act.*

Finally, this section prohibits any waiver of any of the Act's protections, and deems it to be null and void.

SUBTITLE 5. ENFORCEMENT

Section 13. **Denial or suspension of registration**

(a) The Board may deny a registration to any applicant, reprimand any registered preparer, or suspend or revoke a registration if it finds that the applicant or registered preparer:

- (1) fraudulently or deceptively obtains or attempts to obtain a registration for the applicant or registered preparer or for another;
- (2) fraudulently or deceptively uses or allows another to use a registration;
- (3) under the laws of the United States or of any state, is convicted of a felony or a misdemeanor, either of which is directly related to the provision of individual tax preparation services or is related to tax laws;
- (4) is guilty of negligence, incompetence, deception, or misconduct while providing individual tax preparation services;
- (5) violates any regulation adopted under this Act; or
- (6) violates any provision of this Act.

(b) In addition to reprimanding or suspending or revoking a registration under this subsection, the Board may impose a penalty not exceeding \$5,000 for each violation. To determine the amount of the penalty imposed under this subsection, the Board shall consider:

- (1) the seriousness of the violation;
- (2) the harm caused by the violation;
- (3) the good faith of the registered preparer; and
- (4) any history of previous violations by the registered preparer.

(c) The Board shall use any penalty collected under subsection (b) to provide for the enforcement of this section or administration of this Act.

(d) The Board shall give the individual against whom action is contemplated under subsection (a) an opportunity for a hearing before the Board. For any such hearing, the Board may make investigations, subpoena witnesses, and require audits and reports, and shall make findings of fact and conclusions of law. All such hearings shall be open to the public.

(e) Complaint Process. The Board shall establish a complaint process whereby an aggrieved consumer or any member of the public may file a complaint against a registered preparer for any of the acts listed in subsection (a). All complaints shall be considered public records pursuant to [cite for state public records law] with the exception of the complainant's name, address, or other personal identifying information. The Board shall create a toll-free telephone number and an Internet page whereby consumers may obtain complaint forms and information about registered preparers, including information about complaints filed against them.

The Board may hold a hearing upon the request of a party to the complaint. The Board may after such hearing suspend or revoke a registration as provided in subsection (a) or impose a penalty as provided in subsection (b).

(f) No revocation, suspension, or surrender of any registration shall relieve the registered preparers from any civil or criminal liability.

Commentary

This section gives the Board the power to deny, suspend or revoke a preparer's registration based on certain violations. These include fraud or deception concerning registration, criminal convictions related to tax preparation or tax law, violations of the Act or its regulations, or incompetence or misconduct involving individual tax preparation. This section also gives the Board the authority to impose civil penalties for such violations. It is primarily based on Maryland's law, which has very similar provisions.

This section also requires the Board to establish a complaint process for consumers. The complainant or the registered preparer may seek a hearing on the complaint. This section gives the public the right of access to all complaints against registered preparers, except for the personal identifying information of complainants.

Section 14. Cease and Desist Orders Against Unregistered Preparers.

(a) Whenever the Board believes or has notice that any individual is engaged in providing individual tax preparation services without a registration, the Board shall give reasonable notice to the individual, and an opportunity for the individual to be heard. If, following the hearing, the Board finds that the individual has engaged in providing individual tax preparer services without a registration, the Board shall order the preparer to cease and desist from the action.

(b) If the individual continues to engage in an action in violation of the Board order to cease and desist from the action, the individual shall be required to disgorge any fees paid by consumers for individual tax preparation serves, and shall be subject to a penalty of five thousand dollars (\$5,000) for each action it takes in violation of the Board's order.

(c) For any hearings pursuant to this section, the Board may make investigations, subpoena witnesses, and require audits and reports, in preparation for such hearings, and shall make findings of fact and conclusions of law. All such hearings shall be open to the public.

Commentary

This section gives the Board the power to impose penalties against unregistered preparers. One problem that sometimes arises in state licensing schemes is the inability of the licensing agency to impose sanctions on an unlicensed practitioner. This section is intended to avoid that problem by giving the Board authority to take enforcement action against unregistered preparers.

This section provides that a single violation will result in a cease and desist order. Continuing violations will result in a civil penalty.

Section 15. Private Right of Action

(a) The remedies provided herein are cumulative and apply to (1) registered preparers; and (2) unregistered preparers to whom this Act applies and who fail to register.

(b) Any violation by a registered preparer of any state law prohibiting unfair or deceptive acts or practices constitutes a violation of this Act.

(c) Any violation of this Act constitutes a violation of any state law prohibiting unfair or deceptive acts or practices.

(d) Damages. A registered preparer who fails to comply with any provision of this Act is liable to the consumer for: (i) actual and consequential damages; (ii) statutory damages of \$2,500 (to be increased every five years based proportionally on changes in the Consumer Price Index, with fractional amounts rounded to the nearest dollar) or three times the amount of the fee for tax preparation services, whichever is greater; and (iii) reasonable attorney's fees and costs.

(e) Any consumer may sue for injunctive or other appropriate equitable relief to enforce this Act.

(f) Any consumer may bring a class action suit to enforce this Act. In any such class action, a registered preparer who fails to comply with any provision of this Act is liable for: (i) actual and consequential damages for each class member; (ii) statutory damages as set forth in subsection (d)(ii) for each class member; and (iii) reasonable attorney's fees and costs.

(g) The remedies provided in this section are not intended to be the exclusive remedies available to a consumer nor must the consumer exhaust any administrative remedies provided under this Act or any other applicable law.

(h) No written contract for individual tax preparation services shall contain a provision that, prior to a dispute arising, waives or has the practical effect of waiving the rights of a party to that contract to resolve that dispute by obtaining:

- (1) Injunctive, declaratory, or other equitable relief;
- (2) Relief on a class-wide basis;
- (3) Punitive damages;
- (4) Multiple or minimum damages as specified by statute;
- (5) Attorney's fees and costs as specified by statute or as available at common law; or
- (6) A hearing at which that party can present evidence in person.

Any provision in a written contract violating this subsection shall be void and unenforceable. A court may refuse to enforce other provisions of the contract as equity may require.

Commentary

The private right of action gives consumers the ability to enforce the provisions of the Act, allowing them to directly sue tax preparers, both registered and unregistered, for violations. By making violation of the Act also a violation of any state law prohibiting unfair or deceptive acts or practices, it also likely gives enforcement authority to the state Attorney General.

A private right of action is essential to ensuring that the Act has a meaningful impact. Enforcement through the complaint process alone is sometimes inadequate, given the fact that many agencies do not have sufficient resources to investigate all violations and undertake enforcement actions. This is especially true given the proliferation of fringe preparers, some of whom prey on language minorities or isolated communities.

This section permits consumers to seek actual and consequential damages, including costs and attorney's fees. It also imposes a statutory penalty of \$2,500 per violation, or three times the tax preparation fee, whichever is greater. The statutory penalty is important because the actual damages in these cases could be small in some cases, and alone might not deter a business from violating this Act. The statutory penalty is indexed to the Consumer Price Index to prevent its deterrent effect from being eroded by inflation. Statutory penalties of this type are common in state and federal consumer protection acts.

This section includes injunctive relief as another method of discouraging violations by businesses that may not be deterred by damage awards alone. For the same reason, and to assist groups of consumers who have been injured by violation, this section includes a provision allowing for class actions.

The final provision of this section prevents waiver of certain individual rights whose preservation is important for the operation of the justice system, whether the dispute is resolved in court, in arbitration, or otherwise.

SUBTITLE 5. SEVERABILITY

Section 16: **Severability**

If any portion of this Act is determined to be invalid for any reason by a final nonappealable order of any court of this state or of a federal court of competent jurisdiction, then it shall be severed from this Act. All other provisions of this Act shall remain in full force and effect.

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