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THE IRS CONTINUING EDUCATION PROVIDER SYSTEM: RELEVANT OR REDUNDANT?

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Once a professional in any field has completed his basic educational requirements for qualification and obtained his professional credential, he is faced with the prospect of lifelong continuing education (CE). Enrolled Agents (EAs) and certain unenrolled tax return preparers must obtain CE from a provider listed in the Internal Revenue Service's (IRS's) CE Provider System. This article explores the history of the EA designation, the development of CE requirements for Certified Public Accountants and EAs, and the competing listings for CE providers of the IRS and the National Association of State Boards of Accountancy (NASBA). The redundancy of the two sets of CE providers is discussed, concluding that the NASBA listing is superior to the IRS's listing and the CE Provider System should be eliminated.

INTRODUCTION

Zap! Pick your favorite super villain and someone will liken that character to the Internal Revenue Service (IRS). A 2013 survey of the Pew Research Center placed the IRS at the bottom, in popularity, of any part of the federal government.¹ The only lower result was for Congress. Yet, despite public opinion, the IRS is not public enemy number one, and unlike Dr. Doom,² there are things the IRS cannot

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¹ PEW RESEARCH CTR., *Trust in Government Nears Record Low, But Most Federal Agencies Are Viewed Favorably* (Oct. 18, 2013), <https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/10-18-13-Trust-in-Govt-Update.pdf>.

² A character ranked number four among Marvel and DC villains by one critic. See Joseph Walter, *Marvel Vs DC: The 30 Most Powerful Villains, Officially Ranked* (June 25, 2018),

do. Its superpowers are limited, as evidenced by the courts blocking the IRS from implementing regulations that would have extended to unenrolled tax return preparers the requirements imposed on Enrolled Agents (EAs) of passing a qualifying exam, paying an annual application fee, and taking continuing education (CE) courses.³

This article focuses on the CE requirements for EAs and certain other tax return preparers. Part I presents the background and history of EAs, licensure and accreditation, and the need for CE for the accounting profession (also referred to herein as continuing professional education or CPE). Part II discusses the two different CE registry systems for the accounting profession: the National Registry of CPE Sponsors of the National Association of State Boards of Accountancy (NASBA) (the Registry) and the IRS registry of qualified CE providers (the CE Provider System). Part III summarizes attempted IRS regulation of the tax return preparation industry. Part IV analyzes the current CE situation for EAs and certain other return preparers. The article concludes that EAs and other tax return preparers required to obtain CE to practice before the IRS should be allowed to acquire CE from providers listed in the Registry, and the IRS should discontinue the CE Provider System.

I. BACKGROUND AND HISTORY

EAs, as well as certified public accountants (CPAs) and attorneys, may practice before the IRS.⁴ While states regulate admission, and related licensing and CE obligations, to practice as a CPA or an attorney, the IRS determines these requirements for EAs. To establish a framework for analyzing current CE requirements for EAs, this Part discusses the background and history of EAs, the development of CE for professionals, licensing for EAs, and accreditation of CE.

A. *Enrolled Agents*

An EA is a tax expert who specializes in the entire federal tax return process—from tax planning and preparation of the initial tax return to representing taxpayers before the IRS throughout the entire audit process and in the Tax Court. EAs serve as liaisons between the taxpayer and the IRS, allowing the taxpayer to interact with a single professional who intimately knows their tax situation. As a credential, “EA” is unique in that it is issued by the IRS and recognized nationally, whereas the CPA credential is issued by each state’s board of accountancy and is

<https://screenrant.com/marvel-vs-dc-most-powerful-villains-officially-ranked/> (last visited Nov. 7, 2020).

³ *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013), *aff’d*, 742 F.3d 1013 (D.C. Cir. 2014). *See* regulations issued in T.D. 9527, 76 Fed. Reg. 49,650 (Aug. 1, 2011).

⁴ Attorneys and CPAs can automatically practice before the IRS, while an EA (as well as an enrolled actuary and enrolled retirement plan agent) must comply with requirements in Circular 230, which is the term used for regulations governing practice before the IRS. 31 C.F.R. pt. 10, first published in 1921 (4 C.B. 408 (1921)).

only recognized in the state in which it is issued.⁵ Both of these designations began in the late 1800s⁶ and helped shape the accounting profession for more than one hundred years.

Congress enacted The Enabling Act of 1884, also known as the Horse Act of 1884⁷ (the Act), to protect the Treasury Department from fraudulent claims during the Reconstruction period. After the Civil War, citizens wanted their property restored, and there were many others who, seeing an opportunity for profit, were willing to represent them. This second group would take a percentage of the payout for property restoration, so that the larger the payout, the better for the representative. Fraudulent appraisals were common: “Timber used for log cabins, became milled black walnut. If it was made pot metal, it became disguised silver. Row boats were turned into yachts.”⁸ The Treasury Department soon tired of these inflated claims, resulting in Congress passing the Act, which was signed into law by President Chester Arthur in 1884. The Act required that a “standard [be] created, suitability checks, criminal records, moral character, all of these factors along with testing. The people who passed the requirements were known as Enrolled Agents.”⁹

At that time in history, nearly anyone could set themselves up in business to represent others. There was no formal education program for the credentialing of lawyers or accountants, and many professionals learned by apprenticeship instead of by attending school. The “EA” designation was different from other professional designations because of authority granted by the federal government to issue it. “Because the standards for practice as an Attorney were so lax, they and CPAs, as they became evolved, were initially required to take and pass the EA exam in order to practice before the IRS.”¹⁰ The exam ensured that only professionals who passed the exam, as well as complied with strict moral standards and suitability checks, could represent others before the government, thereby relieving the Treasury Department of working with other, less respectable, claimants.

B. *Continuing Education*

CE is a requirement in many fields, including medical professions in which the science changes and legal professions in which the law changes. As an example, nurses are subject to CE requirements. In May 1872, Florence Nightingale wrote in a letter to her nurses, “The progress you make in your year’s training with us is as

⁵ UNIF. ACCOUNTANCY ACT § 23(a)(1) (AICPA/NASBA 2018). Section 23(a)(2) of the *Uniform Accountancy Act* allows for reciprocity of CPA practice between states that have substantially equivalent CPA licensing procedures.

⁶ The EA designation was created by legislation in 1884. Horse Act of 1884, ch. 334, § 3, 23 Stat. 236. The first CPA exam was held in New York in 1896. See NASBA, *10 Totally Random but Interesting Facts About Accounting* 3, <https://nasba.org/app/uploads/2017/07/Infographic-Accounting-Facts.pdf>.

⁷ Horse Act of 1884, ch. 334, § 3, 23 Stat. 236.

⁸ Robert Normandie, *The History of Enrolled Agents*, <https://www.taxesforyou.com/history.htm> (last visited Nov. 7, 2020).

⁹ *Id.*

¹⁰ *Id.* This exam requirement for attorneys and CPAs was not eliminated until 1966. See 31 C.F.R. §§ 10.3(a), 10.3(b) (1966).

nothing to what you must make every year after your year's training is over."¹¹ Besides nurses and teachers, the trend toward CE for professionals quickly encompassed lawyers, engineers, doctors, accountants, as well as many other professions. As Dr. Kevin Garganta said in 1989,¹² "Despite the variation among professions and individual states' policies, [mandatory CE] for professionals is a well-entrenched fact of life for many practitioners in a variety of fields."¹³

In the accounting profession, CE was considered as early as 1958 by the American Institute of Certified Public Accountants (AICPA),¹⁴ which "established a separate division for this purpose"¹⁵ and then by NASBA¹⁶ in 1968. Iowa was the "first state board to adopt a CPE requirement,"¹⁷ and, by 1975, 32 states were in the process of adopting NASBA's resolution that all state boards of accountancy should require some form of CE as a condition for renewal of a license to practice as a CPA.¹⁸ At that time, however, there was no consensus regarding how many hours of CE an accountant should be required to obtain or what types of education should be allowed. The AICPA CPE courses initially included such non-accountant-related subjects as "Managing Stress by the Professional Accountant" and "Quality of Life."¹⁹ Some states counted typical job training for new staff—what would now be called onboarding—as legitimate CPE.²⁰

A courteous yet heated discussion on whether CPE should be voluntary or mandatory is illustrated by this 1972 exchange of letters to the Editor of the *Journal of Accountancy*. First, Mr. C.W. Fullerton, CPA, writes "Why must professional accountants impose compulsory legal requirements upon themselves to insure competence in performance, while other professionals, namely lawyers and doctors, display the maturity and character to maintain their professional competence voluntarily?"²¹ A response from Mr. Elmer Beamer, CPA, followed:

¹¹ Florence Nightingale to her Nurses, *A Selection from Miss Nightingale's Addresses to Probationers and Nurses of the Nightingale School at St. Thomas's Hospital* (Rosalind Nash ed. 2012).

¹² Kevin J. Garganta, Ph.D., served as Director of Field Education at Rhode Island College from 1986 to 1992, specializing in Social Work, and was Program Director of Human Services at Bristol Community College from 1987 to 2019. See https://www.umassalumni.com/s/1640/rd17/-leftCol.aspx?sid=1640&gid=2&pgid=106&cid=283&cat_id=22&mode=search (last visited Nov. 7, 2020).

¹³ Kevin J. Garganta, *The Question of Mandatory Continuing Education for Professionals* 1 (1989), <https://files.eric.ed.gov/fulltext/ED356422.pdf>.

¹⁴ The AICPA is the world's largest member association representing the accounting profession since 1887, with over 431,000 members in 130 countries and territories. See <http://www.aicpa.org> (last visited Nov. 7, 2020).

¹⁵ Milton F. Usry, *The Meaning of Professional Development*, 135 J. OF ACCOUNTANCY 89, 90 (May 1973).

¹⁶ NASBA is a forum for the 55 state boards of accountancy that administer the Uniform CPA Examinations, license CPAs, and regulate the practice of public accounting in the USA. See <http://www.nasba.org/about> (last visited Nov. 7, 2020).

¹⁷ Dale L. Flesher, *100 Years of NASBA Serving the Public Interest* 64 (2007), https://nasba.org/app/uploads/2018/07/100_Years_of_NASBA.pdf.

¹⁸ *Id.* at 65.

¹⁹ Eli Mason, *Letter to the Editor*, 153 J. OF ACCOUNTANCY 100 (Mar. 1982).

²⁰ Usry, *supra* note 15, at 90.

²¹ C.W. Fullerton, *Letter to the Editor*, 133 J. OF ACCOUNTANCY 28 (Apr. 1972).

“The preparation and approval of guidelines by our profession will prevent the imposition of unreasonable requirements on us, and will help us to achieve uniformity throughout the country.”²² Such differing opinions were considered, and, in 1976, the AICPA developed a set of 15 rigorous standards to regulate the quality of CPE courses.²³ By 1979, 44 state boards had adopted CPE requirements.²⁴

C. *Licensure*

Professional licensure is the process of determining that a professional in a field is properly qualified and competent to carry out his professional duties and not harm the public in doing so. Three terms—licensing, certification, and enrollment—have been applied to an EA, yet only the last term is technically correct. Circular 230 specifically warns against use of the term “certification,” stating that EAs “may not utilize the term ‘certified’ or imply an employer/employee relationship with the Internal Revenue Service.”²⁵ Also, according to Circular 230, the correct terms to use are “‘enrolled to represent taxpayers before the Internal Revenue Service,’ ‘enrolled to practice before the Internal Revenue Service,’ and ‘admitted to practice before the Internal Revenue Service.’”²⁶

The term “licensing” is not used in Circular 230 and yet may be the most accurate, commonly used term to describe the regulation of EAs. As Benjamin Shimberg²⁷ stated in 1975: “Licensing refers to a legislative decision that individuals may not engage in an occupation without official sanction. An individual’s qualifications are examined, and he is then licensed to heal the sick, pull teeth, do plumbing, sell pharmaceuticals, cut hair, or bury the dead.”²⁸ The Act was a legislative action that created EAs and gave them official sanction to engage in practice before the Treasury Department. Shimberg further says, “Practitioners in an occupation soon realized that licensing is a way to restrict the supply and hence to be used for the benefit of the practitioners.”²⁹ One of the purposes of the Act was to restrict the quantity of people who were allowed to represent clients before the Treasury Department. Finally, “The social justification for licensure rests on the premise that there are certain occupations requiring regulation in order to protect the public from possible harm at the hands of incompetent or unethical

²² Elmer G. Beamer, CPA, *Response to Letter from C.W. Fullerton, CPA*, 133 J. OF ACCOUNTANCY 28, 29 (Apr. 1972).

²³ AICPA, 1976 *Statement on Standards for Formal Group and Formal Self-Study Programs*.

²⁴ Flesher, *supra* note 17, at 72.

²⁵ 31 C.F.R. § 10.30(a)(1) (2014).

²⁶ *Id.*

²⁷ In 1975, Benjamin Shimberg was Director of Program Development for the Center for Occupational and Professional Assessment at the Educational Testing Service in Princeton, New Jersey. During 1973 to 1974, he served as a member of the National Manpower Advisory Committee’s subcommittee on Training. *About the Authors*, 8 EDUC. & URBAN SOC’Y 120 (Nov. 1975).

²⁸ Benjamin Shimberg, *Testing for Licensing and Certification Outside Education*, 8 EDUC. & URBAN SOC’Y 53 (Nov. 1975).

²⁹ *Id.* at 54.

practitioners.”³⁰ The Act defined the quality of the people who were allowed to petition the Treasury Department on behalf of claimants. The process of applying to be an EA also mirrored the process common to many licensed professionals:

Testing plays a prominent part in virtually all licensing and certification programs, but a candidate is usually permitted to take the examination *only* if he or she satisfies a number of other qualifications. These may relate to characteristics such as age, education, citizenship, residence, moral character, health, training, and experience.³¹

The EA is required to have taxation experience, be over the age of 18, take a rigorous, three-part examination, and undergo tax compliance and background checks to determine if they have been ethical in their professional conduct.³² EAs specialize in tax return preparation and taxation issues, as compared to CPAs, who may prepare tax returns but are more likely to specialize in general accounting, auditing, or attestation.

A final distinguishing sign of licensure is a requirement that learning continue after qualification. As Dr. Milton Usry³³ stated in 1973, “A fundamental characteristic of any learned profession is that its members must commit themselves to a lifetime of study.”³⁴ EAs are currently required to take “[a] minimum of 72 hours of continuing education credit, including six hours of ethics or professional conduct,” which “must be completed during each enrollment cycle,” as well as “a minimum of 16 hours of continuing education credit, including two hours of ethics or professional conduct,” which “must be completed during each enrollment year of an enrollment cycle.”³⁵ Licensing, including official sanction, restriction of quantity and definition of quality of participants, as well as CE requirements, is an accurate descriptor for the regulatory process for EAs.

D. *Accreditation*

Accredited CE is a necessary and ongoing component of most professions once the licensure process has been completed. Accreditation is a methodology whereby an independent organization evaluates and approves the programs of another organization or institution: “Accreditation is a seal of approval (from some independent accrediting body) certifying that an organization or institution has met specific standards.”³⁶ Most people are familiar with the concept of accreditation as

³⁰ Benjamin Shimberg, *Social Considerations in the Validation of Licensing and Certification Exams*, 9 EDUC. MEASUREMENT: ISSUES & PRACTICE 11 (Winter 1990).

³¹ Shimberg, *supra* note 28, at 56.

³² 31 C.F.R. §§ 10.4(a), 10.5(b), 10.5(c), 10.5(d) (2014).

³³ Milton F. Usry was Regents professor of Accounting at Oklahoma State University from 1961 to 1986.

³⁴ Usry, *supra* note 15, at 91.

³⁵ 31 C.F.R. §§ 10.6(e)(2)(i), 10.6(e)(2)(ii) (2014).

³⁶ Rebecca N. Warburton, *Accreditation and Regulation: Can They Help Improve Patient Safety?* (Apr. 1, 2009), <https://psnet.ahrq.gov/perspectives/perspective/74/Accreditation-and-Regulation-Can-They-Help-Improve-Patient-Safety> (last visited Nov. 7, 2020).

it applies to colleges and universities, without understanding how the process works. Using the Higher Learning Commission's³⁷ system as a model, "In general, an institution should anticipate that the process will take at least five years, and often more, to complete."³⁸ Accreditation can also apply to individual programs or schools within a university and is used widely in other fields. Hospitals are accredited by the Joint Commission,³⁹ which "accredits and certifies more than 21,000 health care organizations and programs in the United States."⁴⁰

Another important aspect of accreditation is independence. The organizations producing the educational programs cannot be the same as those doing the accrediting. That would lead to the problems mentioned by Dr. Newton C. Rochte, Ph.D.,⁴¹ namely, that "some national trade and professional associations have conflicts of interest through their control both of CPE programs and the accreditation/certification services provided to their individual members."⁴² Both licensing and accreditation are necessary to ensure professionalism, as well as a system of CPE that is monitored independently and therefore free of questionable procedures.

II. CE REQUIREMENTS FOR ENROLLED AGENTS AND UNENROLLED RETURN PREPARERS

A. *CE for Enrolled Agents*

In 1986, the Treasury Department revised its Circular 230 to require a three-year enrollment and renewal cycle for EAs.⁴³ The revision also required EAs to take CE courses "designed to enhance the professional knowledge of an individual in Federal taxation or Federal tax related matters, i.e. programs comprised of current subject matter in Federal taxation or Federal tax related matters to include accounting, financial management, business computer science and taxation."⁴⁴ CE credit could also be obtained by being the instructor of a CE course, retaking the

³⁷ The Higher Learning Commission (HLC) is an independent corporation that was founded in 1895 as one of six regional institutional accreditors in the United States. HLC accredits degree-granting post-secondary educational institutions in the North Central region of the USA. See <https://www.hlcommission.org/About-HLC/about-hlc.html> (last visited Nov. 7, 2020).

³⁸ HIGHER LEARNING COMMISSION, *Seeking Accreditation: An Overview of the Process*, <https://www.hlcommission.org/Accreditation/obtaining-accreditation.html> (last visited Nov. 7, 2020).

³⁹ The Joint Commission evaluates health care organizations and inspires them to excel in providing safe and effective care of the highest quality and value. See <https://www.jointcommission.org/about-us/> (last visited Nov. 7, 2020).

⁴⁰ FACTS ABOUT THE JOINT COMMISSION, <https://www.jointcommission.org/about-us/facts-about-the-joint-commission/> (last visited Nov. 7, 2020).

⁴¹ Dr. Newton C. Rochte was Dean Emeritus of Higher Education of the University of Toledo, where he specialized in adult and higher education. See <https://www.legacy.com/obituaries/toledoblade/obituary.aspx?n=newton-charles-rochte&pid=149169249> (last visited Nov. 7, 2020).

⁴² Newton C. Rochte, *Accreditation of CPE: A Project for Improving CPE Accreditation Through Greater Involvement of National Associations, Accrediting Bodies, and Certifying Organizations* 21 (Dec. 29, 1992), <https://files.eric.ed.gov/fulltext/ED356352.pdf>.

⁴³ 31 C.F.R. § 10.6(d) (1986). See Notice 86-2, 1986-1 C.B. 381.

⁴⁴ *Id.* § 10.6(f)(1)(i).

Special Enrollment Exam (SEE),⁴⁵ attending formal programs, or writing articles and books.⁴⁶ By imposing a renewal cycle, the IRS ensured EA compliance with CE requirements.

Courses were required to be conducted by a “qualifying sponsor” and satisfy normal educational requirements, such as attendance, a textbook, and an exam.⁴⁷ A “qualifying sponsor” was a “program presenter” that was within one of the following categories: (i) an accredited educational institution, (ii) an organization recognized “for continuing education purposes” by a state licensing body for accounting or law, (iii) an organization recognized by the IRS as offering CE opportunities for EAs, and (iv) an organization that filed a sponsor agreement with the IRS to obtain approval of a program as a qualified CE program.⁴⁸ A provider that met these requirements could apply for “qualifying sponsor status,” and their status as such would be published “on a periodic basis.”⁴⁹ The regulations specified the subject matter of courses and the rules a qualifying provider had to follow, but did not specify from whom the CE courses had to be taken. EAs were required to keep detailed records of the CE taken for three years following the enrollment period.⁵⁰ Also, verification of records was allowed:

The Director of Practice may review the continuing education records of an enrolled individual and/or qualified sponsor in a manner deemed appropriate to determine compliance with the requirements and standards for renewal of enrollment as provided in this part.”⁵¹

Despite these detailed regulations, however, the IRS did not initially establish any procedures for either qualification of sponsors or compliance by EAs.

B. *National Registry of CPE Sponsors*

In 1988, NASBA proposed creating a registry of CPE sponsors that provide uniform, high-quality CPE for CPAs.⁵² Just as there was initial opposition to CPE requirements, there was also resistance to the registry proposal, mainly from state board executives who felt they had not had sufficient opportunity for input. Once again, the *Journal of Accountancy* served as a platform for opposing views. In support of the Registry, James Thomashower, who was then Executive Director of NASBA, wrote, “The national Registry of CPE sponsors is a program developed

⁴⁵ The SEE is a comprehensive three-part exam covering taxation of individuals and businesses, and representation, practices, and procedures of the IRS. It is the credentialing exam for EAs but can also be retaken for CE credit after the credential is obtained. It is updated annually with changes to the tax law. See <http://www.prometric.com/test-takers/search/irs> (last visited Nov. 7, 2020).

⁴⁶ 31 C.F.R. § 10.6(f)(2) (1986).

⁴⁷ *Id.* §§ 10.6(f)(1), 10.6(f)(2), 10.6(g)(3) (2014).

⁴⁸ *Id.* § 10.6(g)(2).

⁴⁹ *Id.* § 10.6(g).

⁵⁰ *Id.* § 10.6(i).

⁵¹ *Id.* § 10.6(n).

⁵² Flesher, *supra* note 17, at 131.

by NASBA to assist state boards in their assessment of CPE sponsors and to assist sponsors and licensees in meeting the requirements of the boards.”⁵³ He detailed the benefits, goals, and procedures for using the Registry. In opposition, David Curbo, CPA, who was on the executive committee of the AICPA, felt that, “[t]he national Registry is a poor implementation of a good idea and will not significantly improve the quality of CPE or reduce the administrative burden on anyone except state boards of accountancy.”⁵⁴ Other detractors were Gordon Scheer, CPA, and Mary E. Medley, CPA, both members of the CPA Society Executive Association (CPA/SEA) who believed that, “The goals are lofty, but the promised benefits are unattainable or nonexistent.”⁵⁵

Despite this variety of opinions, the Registry opened for business in late 1989 and grew steadily, expanding to 1,300 registered sponsors of CPE by 2006.⁵⁶ By 2019, there were “more than 2,150 course providers on the Registry.”⁵⁷ The Registry is now well-established and well-respected, listing sponsors that offer courses in federal taxation, ethics, and general accounting topics.

NASBA and the AICPA have jointly agreed to a set of standards to which all CPE providers listed on the Registry must adhere.⁵⁸ There are 24 standards for providers (sponsors), covering topics such as accuracy and relevance of content, activities dependent on type of course presentation, qualifications of instructors, how credits are measured, responsibilities of providers, and recordkeeping. Together they provide “a framework for the development, presentation, measurement, and reporting of CPE programs.”⁵⁹ The curriculum “is divided into 20 subject matter areas. These subject areas represent the primary knowledge and skill areas needed by accounting licensees to perform professional services in all fields of employment as accepted by the State Boards of Accountancy.”⁶⁰ The application process for a new sponsor starts with an interest form, followed by an application form, supporting documentation, and fees. All courses must be reviewed for accuracy and compliance with the standards before being listed in NASBA’s Course Library.⁶¹

⁵³ James E. Thomashower, *A Benchmark*, 167 J. OF ACCOUNTANCY 86, 86 (Apr. 1989).

⁵⁴ David A. Curbo, *A Good Idea Gone Wrong*, 167 J. OF ACCOUNTANCY 86, 95 (Apr. 1989).

⁵⁵ Gordon Scheer & Mary E. Medley, *A Boondoggle*, 167 J. OF ACCOUNTANCY 86, 95 (Apr. 1989).

⁵⁶ Flesher, *supra* note 17, at 133.

⁵⁷ Videotape: The National Registry of CPE Sponsors, Slide 13, <https://www.nasbaRegistry.org/about-the-Registry> (last visited Nov. 7, 2020).

⁵⁸ NASBA & AICPA, *The Statement on Standards for Continuing Professional Education (CPE) Program* (Dec. 2019).

⁵⁹ *Id.* at v.

⁶⁰ NASBA, *Reviewer Resources – Fields of Study*, <https://www.nasbaRegistry.org/reviewer-program/reviewer-resources> (last visited Nov. 7, 2020).

⁶¹ At the time of a sponsor’s application to be listed in the Registry, NASBA reviews the sponsor’s initial course for approval. *See* details of the review process for the first course at <http://www.nasbaregistry.org/what-sponsors-need-to-know> under “My Organization Is Applying For Membership To The National Registry. Do You Have Tips Or Recommendations To Help With The Application Process? Part Two.” All subsequent courses must be independently reviewed by reviewers who were not involved in the development of the program, as set forth in Standard No. 5, *The Statement on Standards for Continuing Professional Education (CPE) Programs* at 8 (Dec. 2019). Courses provided by sponsors in the Registry are listed with the sponsor’s name in the Course Library at <https://www.nasbaregistry.org/course-library> (last visited Nov. 7, 2020).

In addition, “Organizations must renew their membership annually by the first of the month of their initial approval date. The renewal fees are determined by the total number of different programs offered by the organization.”⁶² The renewal process also includes an online form used to verify that the courses are still in compliance with the standards. NASBA and AICPA have created a rigorous process to ensure the quality of programs of sponsors listed in the Registry, thereby providing for a varied menu of courses from providers well qualified to produce tax classes, such as Deloitte, MIT, Ryan LLC, and the Treasury Department’s Bureau of Fiscal Affairs.

NASBA, which began as a volunteer organization in 1908, found its niche in organizing projects such as the Registry and the CPA exam. Another highly successful project undertaken by NASBA is Professional Credential Services (PCS), which was established in 1998 to manage exams for other professions. “The initial professions serviced in 1998 and 1999 included the Board of Examiners for Engineers, Architects and Surveyors of Puerto Rico, Certification Board of Nuclear Cardiology, Institute of Clinical Education, and the Public Relations Society of America. By 2006, PCS was servicing regulatory agencies in more than 40 professions.”⁶³

C. *Attempted Extension of CE Requirements to Unenrolled Return Preparers*

In 2009, the IRS published a report entitled “Return Preparer Review,”⁶⁴ in which it recommended mandatory registration, a competency exam, CPE requirements, and ethical standards for all unenrolled tax return preparers who were not CPAs or attorneys. The Treasury Department adopted the report’s recommendations in 2011 by revising Circular 230 (the 2011 Regulations).⁶⁵ These regulations added the new category of “Registered Tax Return Preparer” (RTRP)—an individual preparing tax returns for compensation, other than an attorney, CPA, or EA—as within the IRS’s authority to regulate.⁶⁶ The RTRP would be subject to Circular 230, and the application process to become an RTRP would follow the same procedures as required for EAs (i.e., filing of forms, payments of fees, an examination, and compliance and suitability checks).⁶⁷ CE was required for RTRPs, but for 15 hours instead of the 72-hour requirement for EAs.⁶⁸ RTRPs could prepare and sign tax returns and claim refunds but could not represent the taxpayer before an appeals officer, a revenue officer, or IRS counsel, although an RTRP could represent the taxpayer before revenue agents and customer service representatives in an examination of the return that the RTRP prepared or signed.⁶⁹

⁶² NASBA, *Annual Renewal: Renewal Fee*, <https://www.nasbaRegistry.org/current-sponsors/annual-renewal> (last visited Nov. 7, 2020).

⁶³ Flesher, *supra* note 17, at 90.

⁶⁴ IRS, Return Preparer Review, Pub. No. 4832 (rev. Dec. 2009).

⁶⁵ T.D. 9527, 76 Fed. Reg. 49,650 (Aug. 1, 2011).

⁶⁶ See *infra* Part III for discussion of court decisions holding regulations invalid and enjoining the IRS from enforcing them with respect to RTRPs.

⁶⁷ See 31 C.F.R. § 10.5 (2011).

⁶⁸ *Id.* §§ 10.6(e)(3), 10.6(f)(2).

⁶⁹ *Id.* §§ 10.3(f)(3), 10.3(f)(4).

Prior to the 2011 Regulations, Circular 230 made clear that no enrollment or other specific qualifications were required to prepare tax returns.⁷⁰

The 2011 Regulations also added a requirement that qualifying programs for both EAs and RTRPs meet the requirements of a “qualified continuing education program,” provided by a “continuing education provider.”⁷¹ A “continuing education provider” is defined similarly to the “qualifying sponsor” of Circular 230 prior to amendment in 2011, listed in the following sections of § 10.9(a)(1): (i) an accredited educational institution, (ii) an organization recognized for CE purposes by the state licensing body, (iii) an organization recognized and approved by a “qualifying organization” as providing CE on required subject matters, or (iv) “a professional organization, society, or business whose programs include offering continuing professional education opportunities” on required subject matters and recognized as such the IRS.⁷² The IRS can, “at its discretion,” require these providers to file an agreement with the IRS and/or obtain IRS approval of each program as a qualified CE program.⁷³ The IRS has in fact exercised this authority and requires all CE providers, “regardless of status of CE provider,” to obtain a CE provider number to offer IRS-approved CE and pay an annual fee of \$460.⁷⁴ Each program offered by a provider must also be approved by the IRS and assigned a program number.⁷⁵

D. *CE Provider System*

The CE requirements of the 2011 Regulations increased the need for the IRS to provide a registry of approved CE providers from whom the new RTRPs, as well as EAs, could obtain their required CE courses. The IRS established the CE Provider System for this purpose in 2012. The IRS issued Revenue Procedure 2012-12 to “supplement sections 10.6 and 10.9 [of Circular 230] by describing the specific standards and procedures that those organizations, individuals, and entities must follow to be identified as an accrediting organization or accepted as a continuing education provider.”⁷⁶ Approved CE providers under sections (i), (ii), and (iii) of § 10.9(a)(1) of Circular 230 must obtain a CE provider number, renew the number annually, and obtain CE program numbers for each qualifying program they offer.⁷⁷ Individuals or entities that do not meet the qualifications of those sections can apply to the IRS as a “section iv CE provider.”⁷⁸ Every provider must apply through the CE Provider System application process by submitting IRS Form

⁷⁰ 31 C.F.R. §10.7(e) (before amendment in 2011).

⁷¹ 31 C.F.R. §§ 10.6(f)(2)(D), 10.9(a)(1) (2011).

⁷² *Id.* § 10.9(a)(1).

⁷³ *Id.* § 10.9(a)(1)(iv).

⁷⁴ See IRS, CE FAQs: Continuing Education Providers, Q&A 1 (Who can be a CE provider?) (rev. Sept. 14, 2016), <https://www.irs.gov/tax-professionals/ce-faqs-continuing-education-providers> (last visited Nov. 7, 2020); IRS, IRS Continuing Education Providers, <https://www.irs.gov/tax-professionals/irs-continuing-education-providers> (last visited Nov. 7, 2020).

⁷⁵ 31 C.F.R. § 10.9(a)(4) (2011).

⁷⁶ Rev. Proc. 2012-12, § 3, 2012-2 I.R.B. 275.

⁷⁷ *Id.* § 5.01.

⁷⁸ *Id.* §§ 5.01, 5.03.

8498, Continuing Education Provider Application for Provider Number (online or paper application), regardless of which category it is in, as well as receive program numbers for each course it offers.⁷⁹ This means that even a provider that has been approved by the NASBA Registry must also apply to the CE Provider System, pay a fee, and receive program numbers for its courses:

Continuing education (CE) providers wishing to provide CE to enrolled agents and enrolled retirement plan agents must be approved by the IRS. Upon approval, the provider will obtain a Provider Number. In addition, each program (course) offered by the provider must be submitted to the IRS and assigned an approved Program Number. You may not offer programs until you receive your program number.⁸⁰

The revenue procedure sets out standards and the application process for accrediting organizations (referred to as “qualifying organizations” in the 2011 Regulations) that review and approve CE providers.⁸¹ Accrediting organizations are required to renew their status every three years and are not allowed to also be a CE provider.⁸² Currently, the only approved accrediting organization for the CE Provider System is NASBA.⁸³

The IRS uses a third-party vendor, currently Advocation Strategies, Inc., (ASI),⁸⁴ to administer the CE Provider System.⁸⁵ ASI manages the registration process for new CE providers and publishes the current list of CE providers on the IRS website. The system has much of the same framework as the Registry but on a smaller scale. For providers listed in the CE Provider System, the IRS approves only courses in federal taxation, tax updates, and ethics, while providers listed in the Registry offer courses in these three topics, as well as the whole spectrum of financial accounting. About 35 percent⁸⁶ of the providers registered in the CE Provider System are listed in the Registry as well, and there are some providers that are registered on the CE Provider System but not the Registry.

III. STATUS OF REGULATION OF UNENROLLED TAX RETURN PREPARERS

In April 1972, the Legal and Monetary Affairs Subcommittee of the House Committee on Government Operations held hearings on a proposal to regulate

⁷⁹ *Id.* § 5.

⁸⁰ See <https://www.irs.gov/tax-professionals/irs-continuing-education-providers> (last visited Nov. 7, 2020).

⁸¹ 31 C.F.R. § 4 (2011).

⁸² *Id.* §§ 4.02, 4.03.

⁸³ IRS, CE FAQs: Continuing Education Providers [hereinafter CE FAQs], Q&A 4 (Who can be a CE provider?) (rev. Dec. 16, 2011), <https://www.irs.gov/tax-professionals/ce-faqs-continuing-education-providers> (last visited Nov. 7, 2020).

⁸⁴ See https://ceproviderstorage.blob.core.usgovcloudapi.net/public/registration_checklist.pdf.

⁸⁵ CE FAQs, Q&A 2 (Provider Application Process) (rev. Dec. 16, 2011).

⁸⁶ Percentage was determined by the author by manually comparing the number of providers listed on the CE Provider System at <https://www.ceprovider.us/public/default/listing> to the providers on the Registry, as of March 1, 2020, at <https://www.nasbaRegistry.org/sponsor-list>.

income tax return preparers.⁸⁷ Congressman John S. Monagan, who was chair of the committee, had proposed legislation that would allow the Treasury Department to “prescribe regulations governing (1) the recognition of persons who engage in Federal tax return preparation, and (2) qualifications, rules of practice, and standards of ethical conduct required of such persons.”⁸⁸ Notably, Commissioner Johnnie M. Walters testified at the hearing that, “The administration of examinations and the conduct of character investigations for such a large number of individuals is beyond any resources we are likely to get for the job.”⁸⁹ The proposed legislation ultimately did not pass.

The IRS nevertheless issued the 2011 Regulations almost 40 years later in an attempt to extend oversight of tax return preparation to unenrolled return preparers.⁹⁰ The regulations were quickly and successfully challenged in the District Court for the District of Columbia in *Loving v. IRS*.⁹¹ Sabina Loving and two other tax return preparers sued the IRS to prevent enforcement of the 2011 Regulations with respect to the registration of unenrolled tax return preparers, claiming that the 2011 Regulations exceeded the Treasury Department’s authority granted by statute, which states:

The Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases.⁹²

The *Loving* case turned on whether preparing tax returns constituted “practice before the IRS.” The 2011 Regulations defined a tax return preparer as a person who prepares all or a substantial portion of a tax return for compensation.⁹³ Under these regulations, “practice” as a tax return preparer was “limited to preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service.”⁹⁴ The court held for the plaintiff, stating that the 2011 Regulations exceeded the Treasury Department’s authority

⁸⁷ *Regulation of Income Tax Return Preparers: Hearings on H.R. 7590 Before a Subcomm. of the H. Comm. on Gov’t Operations*, 92nd Cong. (1972). See discussion in Gilbert Simonetti, *Regulation of Tax Return Preparers – It’s on the Way*, 134 J. OF ACCOUNTANCY 78, 78-80 (July 1972).

⁸⁸ H.R. 7590, 92nd Cong. (1971).

⁸⁹ *Regulation of Income Tax Return Preparers: Hearings on H.R. 7590 Before a Subcomm. of the H. Comm. on Gov’t Operations*, 92nd Cong. 20 (1972).

⁹⁰ See discussion *supra* Part II.C.

⁹¹ *Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013).

⁹² 31 U.S.C. § 330 (1884).

⁹³ 31 C.F.R. § 10.2(a)(8) (2011).

⁹⁴ *Id.* § 10.3(f)(2) (2011).

and enjoined the IRS from enforcing this registration scheme against unenrolled return preparers.⁹⁵

Not content with the court's decision the IRS appealed the injunction, and in February 2013, achieved a modified injunction as follows:

The Injunction is MODIFIED to make clear that the IRS is not required to suspend its PTIN program, nor is it required to shut down all of its testing and continuing-education centers; instead, they may remain, but no tax-return preparer may be required to pay testing or continuing-education fees or to complete any testing or continuing education unless and until this injunction is stayed or vacated by the Court of Appeals.⁹⁶

The IRS then took the case to the Circuit Court of Appeals for the District of Columbia, which affirmed the district court's decision in February 2014.⁹⁷

The IRS did not give up on its quest to regulate tax return preparers and issued Revenue Procedure 2014-42 to "provide guidance regarding a new, voluntary Annual Filing Season Program (AFSP)."⁹⁸ The AFSP offers a public directory of tax return preparers on the IRS website for those who complete a specific six-hour course and other CE requirements. The AFSP is aimed at unenrolled tax return preparers who voluntarily avail themselves of the CE "for the purpose of increasing their knowledge of the law relevant to federal tax returns." The AFSP also allows participants to represent their own clients as follows:

This section [6] permits unenrolled tax return preparers who obtain a Record of Completion to represent taxpayers before the IRS during an examination of a tax return or claim for refund that they prepared and signed (or prepared if there is no signature space on the form), provided the individual (1) had a valid Annual Filing Season Program Record of Completion for the calendar year in which the tax return or claim for refund was prepared and signed; and (2) has a valid Annual Filing Season Program Record of Completion for the year or years in which the representation occurs.⁹⁹

As part of a 15-hour CE requirement, an applicant is required to take a six-hour federal tax update course—The Annual Federal Tax Refresher (AFTR)—as well as use their PTIN to separately apply to be included in the program and sign an agreement to abide by relevant portions of Circular 230. For their efforts, return preparers receive a Record of Completion and are listed on the IRS's website in its Directory of Providers.¹⁰⁰ The IRS intended to avoid challenges to this program by

⁹⁵ See *Loving*, 917 F. Supp. 2d at 81.

⁹⁶ *Loving v. IRS*, 920 F. Supp. 2d 108 (D.D.C. 2013).

⁹⁷ *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

⁹⁸ Rev. Proc. 2014-42, 2014-29 I.R.B. 192.

⁹⁹ *Id.* at § 6.

¹⁰⁰ See <https://irs.treasury.gov/rpo/rpo.jsf> (last visited Nov. 7, 2020).

stating: “The Annual Filing Season Program described in this revenue procedure is voluntary and no tax return preparer is required to participate.”¹⁰¹ Despite the word “voluntary” in the description, the new AFSP was challenged in the courts by the AICPA, which believed the IRS’s listed tax return preparers constituted competitors to CPAs who also prepare tax returns. Despite a court battle spanning several years, the courts sided with the IRS in allowing it to operate the AFSP.¹⁰²

These cases and revenue procedure show that the IRS has attempted, since 2011, to regulate the tax return preparation industry in general and tax return preparers in particular. From no regulation before 2011 to a voluntary program initiated in 2014, the IRS is moving toward as much regulation as current law allows. Since 2015, there have been numerous attempts by Republicans and Democrats in both the House and Senate to introduce some form of tax return preparation oversight legislation; none of the bills advanced beyond the committee stage. Most recently, Representative Ted S. Yoho (R-FL) and Senator Ron Wyden (D-OR) introduced the Taxpayer Protection and Preparer Proficiency Act of 2019 in both the House and Senate,¹⁰³ whereupon the acts were read and sent to the respective committees, but did not otherwise advance. This is clearly a contemporary and bipartisan issue.

IV. ANALYSIS AND RECOMMENDATION

Sir Francis Bacon said, “Knowledge itself is power,”¹⁰⁴ and the more knowledge of the law that a tax professional can bring to his client, the better. Tax law is constantly changing and all tax professionals, regardless of level, need to keep up with the changes to better serve clients with increasingly complex tax situations. Unfortunately, tax professionals who are required to take CE courses from providers listed on the CE Provider System may miss out on a lot of knowledge.

NASBA started its Registry in 1989 and had 20 years of experience by the time the IRS started the CE Provider System in 2012 to offer CE to the new RTRP and to EAs. Each registry system has standards, an approval process, fees, a renewal process, and a public online listing of providers. Apart from the IRS’s limitation of approved courses to tax topics, and the more rigorous standards of the AICPA, the two systems of registering providers are very similar. Despite the similarities, CE providers that are registered with NASBA must also register with the CE Provider System. The requirement of a second registration and a second fee for exposure to a limited market of EAs and tax return preparers is enough to discourage many sponsors listed on the Registry from this second registration process. This deprives unenrolled tax return preparers and EAs from obtaining the quality CE offerings

¹⁰¹ Rev. Proc. 2014-42, § 3, 2014-29 I.R.B. 192.

¹⁰² See *AICPA v. IRS*, 804 F. 3d 1193 (D.C. Cir.), *rev’g* 2014-2 USTC ¶ 50,488 (D.D.C. 2014) (dismissal of suit because of lack of standing overturned on appeal); *AICPA v. IRS*, 199 F. Supp. 3d 55 (D.D.C. 2016) (on remand, court held interest of plaintiffs was not within the zone of protected interests); *AICPA v. IRS*, 122 AFTR2d 5507 (D.C. Cir. 2018) (reversing 2016 district court decision and holding AICPA had standing, but IRS had the statutory authority to implement the AFSP).

¹⁰³ H.R. 3330, 116th Cong. (2019); S. 1192, 116th Cong. (2019).

¹⁰⁴ Sir Francis Bacon, *Meditationes Sacrae and Human Philosophy* (1597).

and depth of subject matter available through sponsors, such as Deloitte, that are listed on the Registry¹⁰⁵ but not on the CE Provider System.¹⁰⁶ It also limits tax professionals to providers such as Jackson Hewitt, which is listed on the CE Provider System but not on the Registry.

EAs and knowledgeable tax return preparers who have raised their levels of knowledge by taking quality CE are a benefit to IRS personnel who interact with them and protect the public from ignorant or unethical practitioners. The IRS administers the CE Provider System so that EAs and AFSP participants are current on changes in the law and receive guidance on ethical issues. Through the CE Provider System, the IRS hopes to achieve a certain level of education and knowledge for tax return preparers and EAs who have experience rather than formal education. Courses must teach a narrow set of specific subjects in a practical way that is useful to the EAs and tax professionals in their practice. However, the base knowledge level of the average tax return preparer would be higher if courses offered by providers listed on the Registry were available to them.

NASBA started its Registry in 1989 in partnership with the AICPA, which had already developed a set of standards for CPE. The development of the Registry has occurred over 30 years of trial and error and has resulted in a current listing of quality providers offering exceptional courses that leverage modern technology and utilize a variety of presentation methods.

The most expedient and cost-effective plan would be for the IRS to shut down its CE Provider System completely and contract with NASBA to administer the CE system using the Registry. NASBA's experience as an examination administrator for different professions makes it well suited to administering a CPE system for EAs and unenrolled tax return preparers. Either the Registry could have a subsection for IRS-approved courses for EAs and unenrolled tax return preparers, or the IRS could designate which subjects were acceptable for them to take. NASBA's existing program number system could be used for reporting purposes, making recordkeeping simple, and both EAs and unenrolled tax return preparers would be confident in the quality of CPE taken. Using the Registry would alleviate the IRS from the responsibility of informal regulation of CE providers and allow the formal approval process of the Registry to filter out any substandard providers.

The IRS, however, may not want to give up control of its system. It has been attempting to increase regulation of the tax preparation industry, and it may see the elimination of the CE Provider System as a loss of control. The resources spent on its system, however, could go toward enacting legislation necessary to effect regulatory change. The IRS cannot regulate the tax preparation industry, except for EAs, until legislation is passed allowing it to do so. Failed court cases and voluntary programs take resources away from the IRS's primary mission, which is to "[p]rovide America's taxpayers top quality service by helping them understand and

¹⁰⁵ See <https://www.nasbaregistry.org/sponsor-list?&azletter=D&searchgroup=2099EC2E-exhibitors> (last visited Nov. 7, 2020).

¹⁰⁶ See https://www.ceprovider.us/public/default/listing?sortByName=name_asce (last visited Nov. 7, 2020).

meet their tax responsibilities and enforce the law with integrity and fairness to all.”¹⁰⁷

CONCLUSION

A tax return preparer, whether enrolled or unenrolled, may take some interesting CPE courses on tax subjects provided by a sponsor listed on the Registry only to find that their hard-earned credits are not accepted by the IRS. Only CE obtained through a course approved through the CE Provider System is accepted to meet the CE requirements of EAs and return preparers in the AFSP. It can be incredibly frustrating for return preparers to find that CPE credits just achieved are essentially worthless.

The CE Provider System duplicates the registration process for many providers listed on the Registry. A major improvement would be to remove the requirement that CE providers already registered with NASBA register again on the CE Provider System. Making the Registry responsible for all tax-related CPE for EAs and preparers participating in the AFSP would be an even better solution, because it would require providers to register only once. The CE Provider System is also less relevant to return preparers, because it does not adequately provide quality CE to its users. Because of these issues, the IRS should allow EAs and tax return preparers participating in the AFSP to obtain required CE from providers listed in the Registry, and the IRS should discontinue the redundant CE Provider System.

¹⁰⁷ IRS, *The Agency, Its Mission and Statutory Authority*, <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last visited Nov. 7, 2020).