Four states, Oregon, Maryland, California, and New York, have regimes for regulating otherwise unlicensed paid tax return preparers. Each state program includes compulsory education and some standards of practice. The most rigorous programs are those of Oregon and New York, which also include qualification exams and criminal penalties. This article examines the four state programs in depth, but before discussing these programs, it will review the current state of the IRS’s attempts to regulate return preparers.

Licensed tax professionals are governed by standards of practice including state rules of professional responsibility and codes of professional conduct, Circular 230, and the Statements on Standards for Tax Services of the American Institute of Certified Public Accountants (AICPA). However, between 600,000 and 700,000 paid tax return preparers who are not CPAs or attorneys are not subject to any regulation beyond the penalty provisions of the Code. Responding to concern about the conduct and performance of some unlicensed paid tax return preparers, in 2011, the IRS issued regulations that attempted to expand the provisions of Circular 230 to tax return preparation. Among other things, the federal regulations required paid tax return preparers to pass a certification exam, pay annual fees, and complete at least 15 hours of continuing education each year.

In Loving, the court of appeals held that the IRS had exceeded its statutory authority, and granted a permanent injunction against the IRS enforcing the 2011 regulations. On 1/8/15, legislation was introduced to grant the IRS explicit authority to regulate paid tax return preparers. The bill requires that tax return preparers demonstrate competency to advise and assist persons in preparing tax returns and claims for refund.

The district court in Loving had suggested that the IRS use the existing testing centers and staff to create a voluntary program, as “[s]uch voluntarily obtained credentials” might provide preparers a way to “distinguish” themselves from competitors. The IRS then created a voluntary program for return preparers, known as the Annual Filing Season Program (AFSP), to encourage uncredentialed preparers to “improve their knowledge of the federal tax law.” A preparer who completes the AFSP, which includes an exam, continuing education, and a statement of consent to be subject to Circular

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230, is given a “record of completion” and listed in a directory of preparers on the IRS’s website.\(^9\)

Because the AFSP is purely voluntary, and Congress has not yet acted on the proposed legislation, there is no federal regulation of unlicensed return preparers. At the state level, however, four states have programs in place to regulate paid tax return preparation. These four programs are discussed below.

**Oregon**

For the past 40 years, Oregon has required any personal income tax return preparer not already licensed as an attorney or CPA to obtain a state license to prepare tax returns. Oregon was the first state to regulate return preparers, beginning in 1973, and was the model for the IRS’s 2011 regulations.\(^10\) An August 2008 General Accounting Office (GAO) report found that Oregon returns were the most accurate tax returns in the U.S., and that returns filed by Oregon paid preparers were 72% more likely to be accurate than comparable returns filed by paid preparers in the rest of the country.\(^11\)

Attorneys, CPAs, public accountants (and employees of CPAs, public accountants, or registered public accounting firms), and employees who have the incidental duty of preparing income tax returns for their business employer, are exempt from the licensing regime.\(^12\) Oregon has two types of licenses: a tax preparer license and a tax consultant license. A tax preparer is an individual who works under the supervision of a tax consultant, CPA, public accountant, or attorney.\(^13\) A tax consultant is an individual authorized to prepare personal income tax returns in Oregon as a self-employed or independent tax practitioner.\(^14\) Both tax preparers and tax consultants are required to complete 30 hours of instruction or seminar in subjects relating to income tax preparation each year.\(^15\) As noted, Oregon’s regulations apply to preparers of personal income tax returns, and not to preparers of other kinds of returns.\(^16\)

To become a tax preparer, an individual must be at least 18 years old, have a high school diploma or equivalent, complete 80 hours of basic income tax law education, and pass the tax preparer examination administered by the Oregon Tax Board.\(^17\)

The requirements for becoming a tax consultant differ depending on whether the individual is already a tax preparer. If the applicant is a tax preparer, to become a tax consultant, the applicant must have actively worked in the capacity of a tax preparer for a minimum of 1100 hours during at least two of the last five years.\(^18\) In addition, the applicant must have completed a minimum of 15 hours of continuing education within one year prior to submitting the application. Continuing education can include work experience and volunteer experience through recognized programs such as the IRS’s

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3. These Code provisions include Section 6694, which provides for penalties against any person who prepared a return for compensation when there is an understatement of a taxpayer’s tax liability and the position on the return did not meet applicable legal standards, and Section 6695 which includes penalties for failure to provide a copy of the return to the taxpayer, to sign returns, or to furnish an identifying number. In addition, Section 7407 empowers the U.S. to institute civil actions to enjoin tax preparers from engaging in certain kinds of misconduct or to enjoin tax preparers from continuing to practice as income tax return preparers.
5. Loving, 742 F.3d 1013, 113 AFTR2d 2014-867 (CA-DC, 2014). The court explained that the expanded definition of “practice” before the IRS would empower the IRS “for the first time to regulate hundreds of thousands of individuals in the multibillion dollar tax-preparation industry. Yet nothing in the statute’s text or the legislative record contemplates that vast expansion of the IRS’s authority.” Id. at 1021.
9. Id. at section 4.02. In American Institute of CPAs, 114 AFTR2d 2014-6451 (DC D.C., 2014), the AICPA challenged the AFSP, alleging that the IRS had again exceeded its authority, but the district court dismissed the action after finding that the AICPA and its members did not have standing.
11. Id.
16. Or. Rev. Stat. sections 673.605(6) and 673.615(1).
17. Or. Rev. Stat. sections 673.625(1) and (2).
Voluntary Income Tax Assistance (VITA) program. The applicant also must pass the tax consultant examination.

If an individual is not already a tax preparer, he or she must comply with the above requirements, plus submit evidence of completion of at least 80 hours of education on income tax law and 1100 hours of relevant work experience within two of the past five years. Acceptable experience includes employment as an income tax auditor or taxpayer representative with the IRS or Oregon Department of Revenue, tax preparation work performed while employed by a CPA or licensed public accountant, or experience as a tax practitioner in another state.19

In addition to the registration requirements, the Oregon statute provides for disciplinary action, including suspension or revocation of a license, reprimand, civil monetary penalties, and remedial education program. The grounds for disciplinary action are the same as the grounds for refusal to issue or renew a license, and include:

- Preparing, or assisting in the preparation of, personal income tax returns for another for consideration unless the person is a licensed tax consultant or a tax preparer working under the supervision of a tax consultant, an attorney, or a CPA.
- Obtaining or attempting to obtain a license as a tax consultant or tax preparer by any fraudulent representation; representing that the person is licensed as a tax consultant or tax preparer if the person is not so licensed; presenting or attempting to use the license of another person; attempting to use a suspended, lapsed, or revoked license; or falsely impersonating an individual with a license.
- Engaging in dishonesty, fraud, or deception relating to the preparation of personal income tax returns.
- Violating a position of trust, including a position of trust outside the licensee’s professional practice.
- Failure to keep records (tax consultants are required to keep records of all personal income tax returns that they prepare, advise, or assist with, for at least four years).
- Negligence or incompetence.
- Conduct resulting in a conviction of a felony under the laws of any state or of the U.S. that is substantially related to the fitness and ability of the applicant or licensee to engage in the activity for which the license is required, or any crime under the laws of any state or of the U.S., an essential element of which is dishonesty, fraud, or deception.
- Conviction of willful failure to pay any tax or estimated tax; file any tax return; keep records or supply information required under the tax laws of any state or the U.S.; or of the willful making, rendering, delivery, disclosure, signing, or verifying any false or fraudulent list, return, accounts, statement, or other document, or of supplying any false or fraudulent information, required under the tax laws of any state or of the U.S.
- Failure to comply with the continuing education requirements.
- Violation of the code of professional conduct prescribed by the State Board of Tax Practitioners.
- Failure to pay any civil penalty for violating any of the licensing provisions.
- Cancellation, revocation, or refusal to renew a license or registration, or other adverse action by any state or federal agency related to a person’s authority to practice law, to practice as a CPA, public accountant, or enrolled agent related to income tax return preparation or as a result of dishonesty, fraud, or deception.

In addition to civil monetary penalties and other administrative discipline, violation of Oregon’s preparer statute is a misdemeanor.20

22 GAO-08-781.
23 Between 3/1/06 and 2/28/07, 54% of Oregon test takers passed the Tax Preparer examination and 30% passed the Tax Consultant examination. GAO-08-781, p. 12. This suggests that in California and other states that do not have a competency exam, a majority of unlicensed preparers do not have minimum levels of knowledge of federal and state income tax law.
24 Cal. Bus. & Prof. section 22258.
California
Like Oregon, California also has had regulated paid tax return preparers since the 1970s. While Oregon has the highest national rate of accurate returns, California returns were the least likely to be accurate compared to the rest of the country.\textsuperscript{22} This may be due to other factors or to differences in the programs. For example, unlike Oregon, California does not require tax return preparers to pass a competency exam.\textsuperscript{23}

California law requires anyone who prepares tax returns for a fee, other than exempt preparers, such as attorneys, CPAs, and enrolled agents, to register as a tax preparer.\textsuperscript{24} The California law covers the preparation of state and federal income tax returns and state bank and corporate franchise tax returns.\textsuperscript{25} A "certificate of completion" is issued for preparers who have completed 60 hours of instruction in basic personal income tax law, theory, and practice within the previous 18 months, and who provide evidence of compliance with the bonding requirements.\textsuperscript{26} The California Tax Education Council (CTEC) may allow an individual who has a minimum of two year’s recent experience in preparing income tax returns to forgo the 60 hours of instruction, if the experience is the equivalent of the required hours.\textsuperscript{27} The bonding requirement is an important feature of California’s law. Each tax preparer is required to maintain a bond issued by a surety company with a principal sum of $5,000, and to provide clients with evidence of compliance with the bonding requirements.\textsuperscript{28} After obtaining the certificate of completion, the tax preparer must annually obtain a "statement of compliance," which requires 20 hours of continuing education and evidence of compliance with the bonding requirements.\textsuperscript{29}

The California statute contains specific rules for client confidentiality. A tax preparer is prohibited from disclosing confidential information to third parties without the client’s written permission.\textsuperscript{30} Violation of a client’s confidentiality, including the failure to properly shred and destroy client documents, is also a misdemeanor.\textsuperscript{31}

Further, a person who engages in the conduct listed below may be subject to revocation, suspension of registration, with or without conditions, civil injunction or restraining order, fines of up to $5,000 per violation, and misdemeanor charges.\textsuperscript{32}

- Failure to register as a tax preparer.
- Making, or authorizing the making of, fraudulent, untrue, or misleading statements intended to induce a person to use the tax preparation services of a preparer.
- Obtaining the signature of a customer on a tax return or authorizing document that has blank spaces to be filled after it is signed.
- Failure or refusal to give a customer his or her own records or a copy of any document requiring the customer’s signature within a reasonable time after the customer signs the document, or to return records or other data provided to the tax preparer by the customer.
- Failure to maintain a copy of any tax return prepared for a customer for four years from the date of completion or due date of the return, whichever is later.
- Engaging in advertising practices that are fraudulent, untrue, or misleading, or providing false or misleading information to consumers or to bond surety companies in connection with securing the required bonding.
- Failure to sign a customer’s tax return when payment for services rendered has been made. In addition, the following acts are violations subject to a penalty of $1,000 per act and a civil injunction or restraining order, but are not misdemeanors.

- Denial of license, certificate, permit, or registration, or revocation, suspension, restriction, or any other disciplinary action by the U.S. or another state, or any professional licensing board or organization.
- Procuring or attempting to procure registration by fraud, misrepresentation, or mistake.

Oregon was the first state to regulate return preparers, beginning in 1973, and was the model for the IRS’s 2011 regulations.
• Violating or attempting to violate any provision or term of the California preparer rules or any rule or bylaw adopted by the CTEC.

• Conviction of any felony or misdemeanor substantially related to the qualifications, functions, or duties of a registrant.

• Impersonating an applicant or acting as a proxy for an applicant during the preparer examination.

• Impersonating a registered preparer or permitting or allowing an unregistered person to use another’s registration.

• Committing any fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions, or duties of the preparer.

California’s statute has a unique feature that allows an individual client to bring an action against a return preparer. Any person may enforce the duties imposed by the preparer statute by bringing an action to recover a civil penalty of $1,000 for each violation, and if such person prevails in the action, he or she is entitled to reasonable attorney’s fees and costs as well as the civil penalties.34

Maryland
In 2008, Maryland enacted legislation to create a registration system for otherwise unlicensed individual income tax preparers. The purpose of the legislation was to “ensure that qualified individuals provide individual tax preparation services.”35

Under Maryland’s return preparer registration statute, a person may not prepare individual tax returns within Maryland unless registered by the Maryland Board of Individual Tax Return Preparers (Maryland Board).36 Similarly, persons are prohibited from representing to the public that they are a “registered individual tax preparer” or “individual tax preparers” or otherwise authorized to provide individual tax preparation services in the state unless they are in compliance with the registration statute.37

Maryland requires that any person preparing federal income tax returns in Maryland have a federal Preparer Tax Identification Number (PTIN), be at least 18 years old, and have a valid high school diploma or GED.38 Attorneys, CPAs, government employees, and enrolled agents are exempt from Maryland’s registration requirements.39 Registration also requires that the preparer pass the Registered Tax Return Preparer Examination and pay a fee.40

Registrants must complete 16 hours of continuing education every two years and are required to renew their licenses every two years.41 In addition to the examination and continuing education requirements, the Maryland statute contains some standards of practice. First, registered preparers are required to maintain client’s records for the period specified under federal law.42 Second, preparers are required to disclose certain information to the customer in writing, on his or her website, and at the initial meeting between the client and the tax return preparer. This information includes that the commercial tax return preparers. Commercial tax return preparers are preparers who prepared ten or more returns for compensation in the preceding calendar year and will prepare at least one return for compensation during the current calendar year, or prepared fewer than ten returns in the preceding calendar year but will prepare ten or more returns for the current calendar year.20 NYCRR section 2600-2.2(b).

34 Cal. Bus. & Prof. section 22257.
37 Md. Bus. Occ. & Prof. section 21-402.
40 Md. Bus. Occ. & Prof. sections 21-301 through 304.
41 Md. Bus. Occ. & Prof. sections 21-308 and 21-309.
42 Md. Bus. Occ. & Prof. section 21-403(a).
43 Md. Bus. Occ. & Prof. section 21-403(b).
44 Md. Bus. Occ. & Prof. sections 21-403(c)(1) and (2).
45 Md. Bus. Occ. & Prof. section 21-403(c)(3).
46 Md. Bus. Occ. & Prof. section 21-311(a).
50 “Report of the Task Force on Regulation of Tax Return Preparers,” New York State for submission to the Department of Taxation and Finance, the Governor, and the Legislature, 9/28/11), p. 3.
51 Id., pp. 3-4.
52 New York Tax Law section 32(a)(14). The New York legislature permitted the Department of Taxation and Finance to initially apply the registered tax return preparer rules to only the commercial tax return preparers. Commercial tax return preparers are preparers who prepared ten or more returns for compensation in the preceding calendar year and will prepare at least one return for compensation during the current calendar year, or prepared fewer than ten returns in the preceding calendar year but will prepare ten or more returns for the current calendar year. 20 NYCRR section 2600-2.2(b).
53 Id.
54 20 NYCRR section 2600-2.1(c).
55 20 NYCRR section 2600-2.1(g)(1). New York has its own competency examination, but it also requires tax return preparers to pass any IRS competency examination required for federal purposes. 20 NYCRR section 2600-2.3(a). Currently, however, as a result of the Loving decision, there is no required federal competency examination.
56 20 NYCRR section 2600-2.1(h).
57 20 NYCRR sections 2600-2.1(a)-(f).
58 20 NYCRR section 2600-4.3(c).
59 20 NYCRR section 2600-4.1(a).
60 20 NYCRR section 2600-4.1(b).
61 Id.
62 20 NYCRR section 2600-4.2.
64 Rossi v. Blue Cross and Blue Shield of New York, 73 N.Y.2d 588, 593 (1989).
65 20 NYCRR section 2600-4.3(a).
preparer is not a CPA, enrolled agent, or tax attorney, the specific services that the preparer is qualified to provide, and the preparer's education and training as well as examinations that the preparer has passed. Third, the preparer must sign a customer's individual tax return and obtain the customer's signature on the return or authorizing document or disclosure. The preparer is prohibited from disclosing a customer's information unless the customer has consented in writing or the disclosure is authorized by law, necessary for the preparation of the tax return, or in accordance with a court order.

The Maryland Board is authorized to deny registration, to reprimand registered individuals, or to suspend or revoke registration for the following conduct:

- Fraudulently or deceptively obtaining or attempting to obtain registration for the applicant or registered individual or for another, or fraudulently or deceptively using a registration.
- Conviction of any felony or misdemeanor under the laws of the U.S. or any state, which is directly related to the fitness and qualification of the applicant or registered individual to provide individual tax preparation services.
- Violation of any tax preparer regulation or statute.

The Maryland Board is authorized to impose penalties up to $5,000 for each violation. In determining the penalty, the Maryland Board considers: the seriousness of the violation, the harm caused by the violation, the good faith of the preparer, and any previous violations by the preparer.

Like California, Maryland allows individuals to bring legal actions against preparers who have violated the statute. Violation of the tax preparer registration statute is considered an unfair or deceptive trade practice and individuals may bring an action against the person who violated the statute to recover $500 for each violation as well as actual damages sustained as a result of the violation.

New York

New York's new registered return preparer program was based on a 2011 New York Department of Taxation and Finance (NY Department) task force report that cited "serious problems within the tax preparer industry and the impact of these problems on consumers of tax preparation and related services." The report pointed to studies by the Office of the Treasury Inspector General for Tax Administration and the GAO finding that returns prepared by unlicensed tax return preparers "often contained inaccuracies with significant tax consequences such as sizable unjustifiable refunds," and that many of these errors were due to "willful or reckless omissions or misstatements."

In 2014, pursuant to N.Y. Tax Law section 32, New York issued regulations governing the eligibility to prepare tax returns in New York, as well as standards for conduct for all tax return preparers. New York's statute is the most comprehensive of the four programs described in this article. Under New York law, a "tax return preparer" is defined as an individual who prepares a substantial portion of any return for compensation, and includes employees of a tax return preparer or a commercial tax return preparation business. Unlike Oregon and Maryland, New York regulates all commercial preparers of any kind of state tax return, not only individual income tax returns. Attorneys, enrolled agents, public accountants, and CPAs, and their employees who prepare returns under their supervision, are not subject to the registration and educational requirements.

New York's regulatory regime mirrors Circular 230, but governs all tax return preparers as the IRS had intended before the Loving decision. In many respects, however, New York's regime contains even stricter requirements, and has some features that serve the interests of the state of New York beyond tax return preparation services. For example, the NY Department can refuse registration or revoke registration if the tax return preparer has failed to comply with his or her child support obligations.

To prepare New York state tax returns, individuals who are not already attorneys, CPAs, or enrolled agents, must take a competency exam, complete annual continuing education requirements, pay a registration fee, and meet the minimum age and education requirements of being at least 18 years old and having a high school diploma or equivalent. In addition to the New York laws and regulations, all registered return

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preparers must be in compliance with all applicable requirements imposed by the IRS. 56

The NY Department may either decline to register or register subject to conditions and limitations under any of the following circumstances: 57

- Noncompliance with the applicant’s own federal, state, and local tax obligations.
- Conviction of any state or federal offense for which there is a direct relationship between the criminal offense (or the underlying conduct) and tax return preparation, or such that allowing the individual to prepare returns would “involve an unreasonable risk to the property, safety or welfare of specific individuals or the general public.”
- Any adverse finding by any federal, state, or local agency or other disciplinary or licensing organization or board in any administrative action in connection with conduct relating to tax return preparation or involving dishonesty or fraud, a violation of trust or of fiduciary obligations, or misuse of confidential information within the preceding five years.
- Noncompliance with the applicant’s child support obligations.
- Willfully violating, or willfully aiding another to violate, any provision of New York tax law or regulation.
- Engaging in fraud or deceit in connection with his or her tax preparation activities or in connection with his or her application to register as a tax preparer.
- Engaging in acts of dishonesty, fraud, deceit, or other unscrupulous conduct.

In addition, any of the grounds for sanctions discussed below will be grounds for the NY Department to refuse registration or place limitations or conditions on registration.

Like Circular 230, New York’s tax return preparer regulations contain standards of practice, but New York’s regulations cover not just attorneys, CPAs, and enrolled agents, but also registered return preparers. Many of the provisions of New York’s regulations mirror those of Circular 230.

First, tax return preparers are required to cooperate with the NY Department. As a general matter, the return preparer may not “unreasonably delay the prompt disposition of” any matter before the NY Department relating to a return prepared by the preparer. 58 Also, on a proper and lawful request from an authorized officer or employee of the NY Department, the tax return preparer must promptly submit records or information related to a return prepared by the preparer. The only exception is if the preparer believes “in good faith and on reasonable grounds” that the records or information are privileged or otherwise not subject to compulsory production pursuant to subpoena. 59 If the requested records or information are unavailable, i.e., not in the possession, custody, or control of the tax return preparer or his or her client, the tax return preparer must make a reasonable inquiry of the client as to the identity of any person who may have possession or control over the records or information, and pass that information along to the NY Department. 60 The tax return preparer, however, is not required to inquire of third parties or verify information provided by the client about the identity of these third parties. 61 These provisions are similar to Circular 230 section 10.20.

The tax return preparer also cannot interfere, or attempt to interfere, with any proper or lawful effort of the NY Department to obtain any record or information in connection with a return prepared by the tax return preparer, unless the tax return preparer believes that the record or information is privileged or not otherwise subject to compulsory production. 62 Two potential claims of privilege are the attorney-client privilege and the Fifth Amendment privilege against self-incrimination. New York does not have a common law or statutory accountant-client privilege akin to the federally authorized tax practitioner privilege found in Section 7525. 63 As there is no attorney-client privilege with respect to accounting services...
and tax preparation matters, the privilege exception will rarely apply.

Similar to Circular 230 section 10.21 and AICPA Statement No. 6, New York’s return preparer regulations provide rules for how the preparer should handle the discovery of a client’s error or omission on a tax return or any other document filed with the NY Department, the IRS, or other federal, state, or local agency. Under the New York rule, the preparer must advise the client of the consequences of the error or omission. The preparer may not sign or submit a return or any document knowing that it contains an error or omission.

The return preparer also must exercise due diligence as to the accuracy of all returns or related documents, oral and written representations made to the NY Department, and oral and written representations made to clients in connection with a return. A return preparer is presumed to have exercised due diligence when relying on the work product of another person as long as “the preparer used reasonable care in engaging, supervising, training, and evaluating the person . . . ” However, a registered return preparer cannot receive assistance from, or provide assistance to, any person whose registration has been refused, cancelled, or suspended, other than preparing that person’s own tax return.

Registered return preparers are not permitted to charge “an unconscionable fee,” which is defined as either excessive or unreasonable based on the facts and circumstances. A preparer also may not endorse or otherwise negotiate any check or other form of payment issued to a client related to any federal, state, or local tax refund. Circular 230 section 10.27(a) contains similar provisions. The New York regulations prohibit the registered preparer from taking acknowledgements, administering oaths, certifying papers, or performing any official act as a notary public with respect to any matter administered by the NY Department and for which he or she is employed as a tax return preparer.

The New York return preparer regulations direct tax preparers to promptly return any and all records that are necessary for the client to comply with his or her federal, state, or local tax obligations. The existence of a fee dispute does not relieve the preparer of his or her obligation to return client records. The client records governed by this section are the documents provided by the client or obtained by the preparer that existed before the retention of the preparer as well as any materials prepared by the client or a third party (other than an agent or employee of the preparer), and all returns, claims for refund, schedules, affidavits, appraisals, or other documents prepared by the preparer and presented to the client with respect to a prior representation if such document is necessary for the taxpayer to comply with his or her current federal, state, or local tax obligations. Client records do not include any other returns, claims for refund, schedules, affidavits, appraisals, or other documents prepared by the preparer, which can be withheld pending the client’s payment of fees with respect to such documents.

The New York return preparer regulations also contain rules regarding conflicts of interest. A preparer is not permitted to prepare a return for a client or represent a client before the NY Department if such action would involve a conflict of interest. A conflict of interest exists if either the representation of one client would be directly adverse to another client or there is a significant risk that the representation of one or more clients “will be materially limited by the tax return preparer’s responsibilities to another client, a former client or a third person, or by the preparer’s personal interest.” A conflict of interest, however, can be waived if (1) the preparer reasonably believes that he or she will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) each affected client waives the conflict of interest by signing a written confirmation on informed consent. The written waiver must be made within 90 days of the informed consent, must be retained by the preparer for at least 36 months from the conclusion of the representation, and must be provided to the Department on request. This provision is identical in all relevant respects to Circular 230 section 10.29.

The New York regulations also contain standards for positions on tax returns or claims for refund. These provisions are similar to those contained in Section 6694 and accompanying regulations, Circular 230 section 10.34, and AICPA Statements No. 1 and 7. The New York regulations state that a tax return preparer “may not willfully, recklessly, or through gross incompetence,” sign, prepare a portion of, or advise a client to take a position on a tax return or claim for refund that he or she “knows or reasonably should know” contains a position that:
(1) lacks a reasonable basis; (2) is an unreasonable position; or (3) is a willful attempt by the tax return preparer to understate the liability or a reckless or intentional disregard of rules or regulations.80

In determining whether a preparer acted willfully, recklessly, or through gross incompetence, the NY Department will consider whether there is a pattern of conduct.81 Tax return preparers are also prohibited from taking a frivolous position or advising a client to take a frivolous position on any return, affidavit, or other document submitted to the NY Department.82

A preparer must inform a client of any penalties that are “reasonably likely” to apply with respect to positions on a tax return that the preparer advised the client about or when the preparer prepared and signed the tax return.83 This rule applies to any tax return, affidavit, or other paper or document prepared or signed by the preparer and submitted to the NY Department.84 Also, the preparer must inform the client of any opportunity to avoid penalties through disclosure and of the requirements for making an adequate disclosure.85

The regulations permit the preparer to rely on information furnished by clients in good faith without verification.86 The preparer may not “ignore the implications of information furnished to, or actually known by, the preparer, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.”87

Like Circular 230 section 10.37, the New York preparer regulations contain requirements for written tax advice. These requirements apply to any written advice, including e-mail or other electronic communications, regarding one or more federal, state, or local tax matters.88 The regulations require the tax return preparer to take the following steps in rendering any written advice: (1) base the written advice on reasonable factual and legal assumptions (including assumptions as to future events); (2) reasonably consider all relevant facts and circumstances that the tax return preparer knows or reasonably should know; (3) use reasonable efforts to identify and ascertain the facts relevant to written advice on each tax matter; (4) not rely on representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; (5) relate applicable law and authorities to facts; and (6) in evaluating a tax matter, not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.89

A preparer may rely on the representations of others as well as the advice of another person, as long as the reliance is reasonable under the facts and circumstances.90 Reliance will not be reasonable if the tax preparer knows or has reason to know that a representation or assumptions on which a representation is based are incorrect, incomplete, or inconsistent.91 Reliance on advice of another person is not reasonable if the tax preparer knows or reasonably should know that the opinion of that person should not be relied on, the other person is not competent or lacks the necessary qualifications to provide the advice, or the other person has a conflict of interest in violation of New York’s regulations governing return preparers.92 When evaluating written advice, the NY Department “will apply a reasonable tax return preparer standard,” that takes into account the facts and circumstances, including the scope of the engagement and the type and specificity of the advice sought by the client.93 If an opinion

80 20 NYCRR sections 2600-4.3(h)(1) and (4).
81 20 NYCRR section 2600-4.3(h)(2).
82 20 NYCRR section 2600-4.3(h)(3).
83 20 NYCRR section 2600-4.3(h)(5)(i).
84 20 NYCRR section 2600-4.3(h)(5)(ii).
85 20 NYCRR section 2600-4.3(h)(5)(iii).
86 20 NYCRR section 2600-4.3(h)(6).
87 Id.
88 20 NYCRR section 2600-4.3(i).
89 20 NYCRR sections 2600-4.3(i)(1) and (2).
90 20 NYCRR sections 2600-4.3(i)(3) and (4).
91 20 NYCRR section 2600-4.3(ii)(3).
92 20 NYCRR section 2600-4.3(ii)(4).
93 20 NYCRR section 2600-4.3(ii)(5).
94 20 NYCRR section 2600-4.3(i)(5)(iii).
95 20 NYCRR section 2600-4.3(i)(7)(i).
96 20 NYCRR section 2600-4.3(i)(7)(ii).
97 20 NYCRR sections 2600-3.3 and 2600-6.1.
98 “Reckless conduct” is defined as a “highly unreasonable action, omission, or misrepresentation from the standards of ordinary care that a tax return preparer should observe under the circumstances.” 20 NYCRR section 2600-3.4(a).
99 “Gross incompetence” is defined as including “conduct that reflects gross indifference, tax return preparation or tax practice that is grossly inadequate under the circumstances, or a consistent failure to perform obligations to the client.” Id.
100 20 NYCRR section 2600-3.1.
101 20 NYCRR sections 2600-5.1(e), (i)-I, (a).
will be used for marketing, promoting, or recommending a tax shelter (i.e., “a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of tax”), the NY Department will consider as one of the facts and circumstances that “additional risk caused by the tax return preparer’s lack of knowledge of the taxpayer’s particular circumstances.”

Similar to Circular 230 section 10.36, persons in charge of a firm that advises on returns or prepares returns may be subject to discipline for the actions of others in the firm. Persons who oversee a firm’s practice of preparing tax returns, claims for refunds, or other documents for submission to the department are required to “take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying” with these regulations. Any such person who has this principal authority, or who shares it with others, will be subject to discipline if the person “through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply” with the regulations, or members, employees, or others associated with the firm have “engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply” with these regulations. A person with principal authority also will be subject to discipline if he or she knows or should know that any employees, members, or others associated with the firm are not complying with the regulations, and he or she willfully, recklessly, or through gross incompetence does not take reasonable steps to “take prompt action to correct the compliance.”

The NY Department has authority to suspend or cancel a registration or to place conditions on a preparer’s ability to prepare tax returns in the future, such as requiring remedial educational classes, for violating any of the above standards of conduct, as well as any of the conduct enumerated as grounds for denial, suspension, or revocation of registration.

Grounds for sanctions include situations in which a tax return preparer has (1) been shown to be incompetent or disreputable; (2) willfully, recklessly, or with gross incompetence; (3) failed to comply with the standards governing return preparers or any other regulations or statutes governing the conduct of individuals who prepare New York state tax returns; or (4) willfully and knowingly misled or threatened a client or prospective client with the intent to defraud.

“Incompetence and disreputable conduct” specifically include the following conduct, described above in connection with the registration requirements: criminal convictions, adverse disciplinary actions, willful noncompliance with tax obligations, willful violation of the law and failure to register, pay required fee, or complete educational requirements. In addition, the following conduct is subject to sanctions:

- Knowingly giving false or misleading information to the NY Department or its officers or employees, or any tribunal that considers New York state tax matters.
- Willfully assisting, counseling, or encouraging a client or prospective client in violating any federal, state, or local tax law, or to evade payment of any federal, state, or local tax obligations.
- Misappropriating, or failure to properly or promptly remit, funds received from a client for payment of taxes or other obligations due to federal, state, or local government.
- Attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the department by the use of threats, false accusations, duress, or coercion, by the offer of any special inducement or promise of an advantage or by the bestowing of any gift, favor, or thing of value.
- Knowingly hiring, employing, or otherwise aiding and abetting an unregistered tax return preparer to engage in the practice of return preparation.
- Engaging in contemptuous conduct in connection with a return prepared by the preparer or in practice before the Department regarding that return.
- Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion that is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under federal, state, or local tax laws.
- Willfully failing to sign a return as required by federal, state, and local tax law.
- Willfully or recklessly disclosing tax returns or tax information in a manner not authorized by state or federal law or otherwise permitted will be subject to discipline.
- Willfully using false or misleading representations to procure employment or to suggest that the preparer is able to improperly obtain special consideration or action from the depart-
The AICPA’s view

The AICPA has taken the position that state level regulations, like those discussed in this article, “can have negative consequences on the CPA profession while doing little to protect taxpayers.”103 The AICPA believes that these programs add an unnecessary layer of costs that are passed on to taxpayers, and that the individual state continuing education and testing requirements create compliance challenges for tax preparers who prepare returns in multiple states.104 As the AICPA has noted, however, the National Consumer Law Center has released model language for state legislation, which may cause more states to consider enacting their own tax return preparer legislation.105

Conclusion

As can be seen from this overview of the four existing state level programs, without some system of reciprocity between states, a preparer who prepares returns in multiple states is subject to tremendous compliance burdens. The two states with the longest running tax return preparer programs have diametrically opposed results, with Oregon having the most accurate returns and California having the least accurate returns in the nation. As the actual effectiveness of preparer regulations is unclear, the AICPA raises a legitimate concern as to whether additional state or national regulation would improve results or merely over-burden preparers and regulators. ■

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102 20 NYCRR section 2600-1.1(b).
104 Id.