IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, 1455 Pennsylvania Avenue, NW Washington, DC 20004, Plaintiff, v. INTERNAL REVENUE SERVICE 1111 Constitution Avenue, NW Washington, DC 20224, and JOHN A. KOSKINEN, in his official capacity as Commissioner of Internal Revenue, Office of the Commissioner 1111 Constitution Avenue, NW Washington, DC 20224, Defendants.	Civil Action No. _____

COMPLAINT AND PRAYER FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS ("AICPA") for its complaint against Defendants the INTERNAL REVENUE SERVICE ("IRS") and the Honorable JOHN A. KOSKINEN, in his official capacity as Commissioner of Internal Revenue ("Commissioner"), alleges, by and through its attorneys, as follows:

PRELIMINARY STATEMENT

1. This is an action under the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("APA") challenging the IRS's recently issued rule entitled the "Annual Filing Season Program" ("AFS rule"). The AFS rule is an illegitimate exercise of government power, as it violates the APA and also represents an impermissible end run around *Loving v. IRS*, a recent decision by the U.S. Court of Appeals for the District of Columbia Circuit which invalidated a nearly identical IRS rule. Notably, in *Loving* the Court ruled that the IRS lacks statutory authority under 31 U.S.C. § 330 to regulate unenrolled tax return preparers. Undeterred by the Court's ruling, the IRS and the Commissioner seek to implement a nearly identical rule disguised as a purportedly "voluntary" program. The IRS's actions are an obvious attempt to bypass the Court's binding decision and to assume powers Congress has not given it.

2. In issuing the rule, the IRS ignored the notice and comment requirements of the APA. Instead, the IRS adopted the AFS rule in the form of a Revenue Procedure. *See* Rev. Proc. 2014-42, 2014 WL 2931528, § 4.05 (June 30, 2014). By circumventing the protections afforded by the APA, the IRS avoided having to respond to comments that would have demonstrated that the AFS rule is fatally flawed and arbitrary and capricious.

3. In 2011, the IRS adopted regulations requiring unenrolled tax return preparers to pass a written examination consisting of 100 scored questions, pass a character and fitness assessment, and complete 15 hours of continuing education training each year. *See* 76 Fed. Reg. 32,286, 32,290 (June 3, 2011); Internal Revenue Serv., Registered Tax Return Preparer Test: Candidate Information Bulletin, at 4 (Apr. 16, 2012), *available at* http://www.irs.gov/pub/irs-utl/rtrpcandidateinfobulletin.pdf. This rule was invalidated in *Loving*.

4. The AFS rule is nearly identical to the rule invalidated in *Loving*. Among other requirements, the new rule requires tax return preparers to pass a written examination consisting of at least 100 questions, complete between 15 and 18 hours of continuing education each year, and agree to be subject to portions of Treasury Department Circular No. 230—which regulates practice before the IRS—to which they would not otherwise be subject. *See* Rev. Proc. 2014-42, § 4.05. In return for satisfying these criteria, participants will be awarded a "Record of Completion" and be listed in a newly created Directory of Federal Tax Return Preparers. *Id.* § 4.02; Internal Revenue Serv., *IRS Unveils Filing Season Program for Tax Return Preparers, available at* http://www.irs.gov/uac/Newsroom/IRS-Unveils-Filing-Season-Program-for-Tax-Return-Preparers,-Answers-Frequently-Asked-Questions. Similar to the character and fitness requirement contained in the previous rule, the AFS rule also provides that certain individuals are ineligible. For example, an individual who has previously been disbarred, suspended, or disqualified from practicing before the IRS may not obtain a Record of Completion or a place in the Directory of Federal Tax Return Preparers during the period in which he is disbarred, suspended, or disqualified. Rev. Proc. 2014-42, § 4.06(1).

5. The IRS lacks statutory authority to proceed with the AFS rule. Notably, the IRS cites no authority for its new rule. Without statutory authority, the AFS rule is invalid. *See* 5 U.S.C. § 706(2)(C).

6. Indeed, the fact that the IRS has proceeded with the AFS rule is particularly brazen in light of the Court's decision in *Loving*, which expressly stated that although "[i]t might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter," "that is a decision for Congress and the President to make if they wish by enacting new legislation." *Loving v. IRS*, 742 F.3d 1013, 1022 (D.C. Cir. 2014). In fact, the IRS

has asked Congress to provide it with statutory authority to regulate unenrolled tax return preparers. Rev. Proc. 2014-42, § 2; Department of the Treasury, General Explanations of the Administration's Fiscal Year 2015 Revenue Proposals, at 244 (Mar. 2014), *available at* http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2015.pdf. Thus far, Congress has declined that request. Rather than wait for Congress to provide such authority, the IRS now seeks to implement the regulations through a *de facto* rule in an affront to the Court's binding decision in *Loving* and to the legislative prerogatives of Congress.

7. The IRS may contend that the AFS rule is different from the rule invalidated in *Loving* because it is purportedly voluntary. In reality, however, the new rule is *de facto* mandatory because it creates a strong competitive incentive for unenrolled tax return preparers to comply. Indeed, Commissioner Koskinen and the IRS have admitted as much. Commissioner Koskinen stated that the Record of Completion and place in the Directory of Federal Tax Return Preparers will enable those who successfully complete the program "to stand out from the competition by giving them a recognizable record of completion that they can show to their clients." Stephen Ohlemacher, *IRS Announces Voluntary Program To Certify Tax Preparers Who Complete Course, Pass Test*, Associated Press (June 26, 2014) (internal quotation marks omitted), *available at* http://www.usnews.com/news/politics/articles/2014/06/26/irs-announces-program-to-certify-tax-preparers. And in the Revenue Procedure implementing the rule, the IRS explained that a tax return preparer "who successfully completes continuing education courses related to federal law will generally have a better understanding of the tax law necessary to represent a taxpayer before the IRS during an examination than an unenrolled individual who has not taken any continuing education courses related to federal tax law." Rev. Proc. 2014-42, § 2.

8. These statements make clear that the IRS understands the incentives created by the AFS rule: Faced with the prospect of not participating and losing business, tax return preparers will "choose" to comply. As a result, the AFS rule is mandatory as a practical matter, and achieves substantially the same outcome as the rule invalidated in *Loving*.

9. With this new rule, the IRS has flouted the notice and comment requirements of the APA, depriving the public, including Plaintiff AICPA and its members, of an opportunity to comment on regulations that will profoundly affect the multibillion dollar tax return preparer industry. *See* Internal Revenue Serv., Internal Revenue Service Return Preparer Review, at 7 (2009) (noting that the tax return preparer industry "is a multibillion dollar industry"), *available at* http://www.irs.gov/pub/irs-utl/54419l09.pdf. Had the IRS provided a comment period, it would have been forced to respond to the AICPA's concern that the AFS rule is fatally flawed.

10. The AFS rule is arbitrary and capricious on its own terms. The AICPA has raised its concerns that the rule is arbitrary and capricious, but the IRS has dismissed these concerns out of hand. By creating four new categories (for a total of eight) of tax return preparers, the rule will confuse consumers. And the AFS rule will not effectively address the policy issues related to unethical tax return preparers who knowingly understate income or file invalid refund claims for their clients.

11. For the reasons set forth herein, the Court should declare unlawful and vacate the AFS rule.

PARTIES

12. Plaintiff AICPA is the world's largest member association representing the accounting profession, with more than 394,000 members in 128 countries and a 125-year heritage of serving the public interest. The AICPA is incorporated under the laws of the District

of Columbia, with its principal place of business at 1211 Avenue of the Americas, New York, NY 10036. AICPA members represent many areas of accounting practice, including business and industry, public practice, government, education, and consulting. The AICPA sets ethical standards for the accounting profession and U.S. auditing standards for audits of private companies, nonprofit organizations, and federal, state, and local governments. It develops and grades the Uniform CPA Examination and offers specialty credentials for CPAs who concentrate on personal financial planning, fraud and forensics, business valuation, and information technology. Its members include individual CPAs and accounting firms. Certain accounting firms that are members of the AICPA employ individuals who will be injured by the additional regulatory burdens created by the AFS rule. In addition, AICPA members will be directly injured by the AFS rule because it requires firms to "take reasonable steps" to ensure that their newly regulated employees comply with Circular 230. *See* Rev. Proc. 2014-42, § 6.03; 31 C.F.R. § 10.36(b). AICPA members also will suffer injuries because the rule will cause confusion among consumers. These injuries are directly and immediately traceable to the AFS rule and would be remedied by a judgment vacating the rule. The interests that the AICPA seeks to protect in filing this lawsuit on behalf of its members are germane to its organizational mission of representing CPAs. Neither the claims asserted nor the relief requested in this lawsuit requires the participation of individual AICPA members.

13. Defendant Internal Revenue Service is, and was at all times relevant hereto, an administrative agency of the United States Government, subject to the APA. *See* 5 U.S.C. § 551. The Service is headquartered at 1111 Constitution Avenue, NW, Washington, DC 20224.

14. Defendant John A. Koskinen is being sued in his official capacity as the Commissioner of Internal Revenue. He serves as the head of the Internal Revenue Service in Washington, DC.

JURISDICTION AND VENUE

15. This action arises under the APA. This Court has subject-matter jurisdiction over this action under 28 U.S.C. § 1331. This Court is authorized to issue the non-monetary relief sought herein pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, and the APA, 5 U.S.C. §§ 702, 705, 706.

16. Venue is proper in this Court under 28 U.S.C. § 1391(e) because this is an action against officers and agencies of the United States; Defendant Internal Revenue Service is found in this judicial district; Defendant Commissioner Koskinen performs his official duties in this judicial district; a substantial part of the events or omissions giving rise to this action occurred in this judicial district; and Plaintiff resides in this judicial district and no real property is involved in the action.

FACTUAL ALLEGATIONS

I. THE REGISTERED TAX RETURN PREPARER RULE

17. Because the "federal income tax code is massive and complicated" "it is not surprising that many taxpayers hire someone else to help prepare their tax returns." *Loving*, 742 F.3d at 1014. In federal tax law parlance, a person who "prepares for compensation, or who employs one or more persons to prepare for compensation, ... a substantial portion of a return or claim for refund" is a "tax return preparer." 26 U.S.C. § 7701(a)(36)(A); *see* 26 C.F.R. § 1.6109-2(g) (noting that, for relevant purposes, a tax return preparer is "any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax").

18. Tax return preparers historically fall into four major categories. *First*, "certified public accountants" are accounting professionals who are licensed by a state board of accountancy. Internal Revenue Serv., *Understanding Tax Return Preparer Credentials, Internal Revenue Service, available at* http://www.irs.gov/Tax-Professionals/Understanding-Tax-Return-Preparer-Credentials. CPAs must pass a rigorous examination (the Uniform CPA Examination), meet educational and good character requirements, comply with ethical requirements, and satisfy continuing education requirements as established by the relevant state licensing agency. *Id.*

19. *Second*, attorneys may also prepare tax returns. *See id.* A relatively small number of attorneys nationwide prepare tax returns for taxpayers, generally as part of administering a client's trust or estate.

20. *Third*, "enrolled agents" are individuals trained in federal tax planning, tax preparation, and representation of taxpayers before the IRS. *Id.* Enrolled agents are licensed by the IRS. *Id.* They must pass an examination (the Special Enrollment Examination) and a "suitability check," and enrolled agents must complete 72 hours of continuing education every three years. *Id.*

21. *Fourth*, "unenrolled tax return preparers" are paid tax return preparers who, prior to the rule invalidated in *Loving*, were not subject to licensing by the IRS or by any state. *Id.*; Guide to Enrolled Agent Program, IRS Publication No. 4693-A. (Mar. 2012). Unenrolled tax return preparers are subject to numerous federal statutes, which enable the IRS to impose civil and criminal penalties on incompetent or unethical unenrolled tax return preparers. *See, e.g.*, 26 U.S.C. §§ 6694, 6695, 6700, 6702, 6707A, 6713, 7201, 7206, 7207, 7213, 7404.

22. All four categories of tax return preparers must obtain a Preparer Tax Identification Number ("PTIN"). *See* 26 U.S.C. § 6109; 75 Fed. Reg. 60,309, 60,309 (Sept. 30,

2010). To obtain a PTIN, tax return preparers must fill out Form W-12 and pay a PTIN user fee each year. Tax return preparers are required by law to include their PTIN on each tax return they sign so that the IRS may identify who prepared the tax return. *See id.*

23. In June 2011, the IRS issued a rule that applied to unenrolled tax return preparers—the Registered Tax Return Preparer rule ("RTRP rule"). *See* 76 Fed. Reg. 32,286 (June 3, 2011). Under this rule, unenrolled tax return preparers were no longer permitted to prepare tax returns for compensation. *See id.* at 32,287. Instead, an unenrolled tax return preparer had to complete several criteria to become a "registered tax return preparer." *Id.*

24. The criteria for becoming a registered tax return preparer were: An individual had to (1) be at least 18 years old; (2) pass a written examination consisting of 100 scored questions; (3) pass a character and fitness assessment; (4) have a valid PTIN; (5) pay a nonrefundable application fee; and (6) complete 15 hours of continuing education training each year. *See id.* at 32,301, 32,303.

25. Of the required 15 hours of continuing education, the rule required 10 hours of training in "Federal tax law topics," three hours in "Federal tax law updates," and two hours in ethics or professional conduct. *See id.* at 32,290.

26. In issuing the RTRP rule, the IRS purported to rely on 31 U.S.C. § 330 as its source of statutory authority. *See id.* at 32,286. Section 330 grants the Department of the Treasury (of which the IRS is a part) the authority to "regulate the practice of representatives before the Department of the Treasury." *See* 31 U.S.C. § 330.

II. THE COURTS INVALIDATE THE REGISTERED TAX RETURN PREPARER RULE

27. In 2012, several unenrolled tax return preparers filed a lawsuit challenging the RTRP rule in this Court.

28. Plaintiffs alleged that the IRS lacked statutory authority for the rule. Specifically, Plaintiffs alleged that tax return preparers are not "representatives" and do not "practice before" the IRS, as required under Section 330 for the IRS to exercise authority. Plaintiffs sought a Declaratory Judgment that the rule was unlawful and a permanent injunction prohibiting the IRS from implementing the rule.

29. On January 18, 2013, the District Court granted Plaintiffs' motion for summary judgment, agreeing with Plaintiffs' argument that tax return preparers are not "representatives" and do not "practice before" the IRS. The Court issued an order declaring the RTRP rule unlawful. *See Loving v. IRS*, 917 F. Supp. 2d 67 (D.D.C. 2013).

30. The IRS appealed the District Court's ruling to the U.S. Court of Appeals for the District of Columbia Circuit. On February 11, 2014, the D.C. Circuit affirmed the District Court's judgment, agreeing that the IRS lacks authority under Section 330 to regulate tax return preparers.

31. The Court identified several considerations that supported its conclusion. *First*, the Court concluded that tax return preparers are not "representatives" of taxpayers and do not "practice before" the IRS. *See Loving*, 742 F.3d at 1016-19. Accordingly, the Court concluded that the IRS's authority to "regulate the practice of representatives before the Department of the Treasury" did not provide a legal basis for the rule. *See id.* at 1021-22.

32. *Second*, the Court noted that Section 330, as originally enacted in 1884, would not have applied to tax return preparers. *Id.* at 1019-20. Because the only revisions to Section 330 came in 1982 when Congress re-codified the code without making any substantive changes, the Court concluded that the history of Section 330 also foreclosed the IRS's interpretation. *Id.* at 1020.

33. *Third*, the Court concluded that the broader statutory framework of the Internal Revenue Code foreclosed the IRS's interpretation. *Id.* at 1020-21. Multiple other provisions of the Internal Revenue Code provide the IRS with authority to regulate and sanction all tax return preparers, including unenrolled tax return preparers. These provisions show that, rather than hand the IRS plenary authority over tax return preparers, Congress has opted for a more targeted approach. The Court concluded that any attempt to expand Section 330 would undermine Congress's selection of a more targeted approach. *See id.*

34. *Fourth*, the Court observed that the IRS's interpretation that tax return preparers are covered by Section 330 would "for the first time . . . regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry." *Id.* at 1021. Under Supreme Court precedent, "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies." *Id.* (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). Because nothing in the statutory text of Section 330 or its accompanying legislative history hints that Congress intended to grant the IRS authority over tax return preparers through Section 330, the Court explained that, consistent with Supreme Court precedent, it was simply not plausible that Congress would have silently expanded the IRS's jurisdiction so dramatically. *Id.*

35. *Fifth*, the Court explained that the IRS's previous approach to the statute, while not determinative, also reinforced the conclusion that Section 330 does not grant the IRS authority over tax return preparers. *Id.* In 2005, the head of the IRS Criminal Investigation Division testified to Congress that "[t]ax return preparers are not deemed as individuals who represent individuals before the IRS." *Id.* (quoting *Fraud in Income Tax Return Preparation: Hearing Before the Subcommittee on Oversight of the House Committee on Ways and Means*,

109th Congress (2005) (testimony of Nancy J. Jardini)) (internal quotation marks omitted). And in 2009, the IRS issued a guidance document explaining that "[j]ust preparing a tax return . . . is not practice before the IRS." *Id.* (quoting Practice Before the IRS and Power of Attorney, IRS Publication 947, at 2 (Apr. 2009)) (internal quotation marks omitted).

36. Accordingly, the Court held that the IRS lacked the authority under Section 330 to regulate tax return preparers in this manner, reasoning that although it might be good policy to provide additional regulation of tax return preparers, such a decision was properly made by Congress and the President through legislation.

III. THE IRS INSTITUTES THE ANNUAL FILING SEASON RULE

37. After the *Loving* decision, the IRS began to consider implementing a rule governing tax return preparers that would be nearly identical to the RTRP rule struck down in *Loving*. The AICPA met with IRS officials several times and explained in writing its view that the IRS was required to provide for a comment period before proceeding and expressed its concern that a purportedly "voluntary" program would confuse consumers and would not address the most pressing problems related to unregulated tax return preparers.

38. The IRS, however, nonetheless chose to avoid public comments on these issues, and issued the AFS rule pursuant to a Revenue Procedure released on June 30, 2014.

39. The AFS rule provides that tax return preparers who complete the program are afforded enhanced regulatory status. They can obtain a Record of Completion and be listed in a Directory of Federal Tax Return Preparers if they successfully meet several criteria. *See* Rev. Proc. 2014-42, § 4.02; Internal Revenue Serv., *IRS Unveils Filing Season Program for Tax Return Preparers*, *available at* http://www.irs.gov/uac/Newsroom/IRS-Unveils-Filing-Season-Program-for-Tax-Return-Preparers,-Answers-Frequently-Asked-Questions. Tax return preparers

who complete the program are also permitted to "represent taxpayers before the IRS" during an examination of a tax return or a claim for refund. *See* Rev. Proc. 2014-42, § 6.01.

40. To obtain these benefits, a tax return preparer must (1) obtain a valid PTIN; (2) complete a "refresher course"—a six-hour continuing education program; (3) pass an examination with a minimum of 100 questions; (4) complete between 15 and 18 hours of continuing education training; and (5) agree to be subject to subpart B and section 10.51 of Circular 230, which establishes duties and rules relating to practice before the IRS. *See id.* § 4.05. Absent the AFS rule, unenrolled tax return preparers would not be subject to these portions of Circular 230. In addition, the rule provides that certain individuals—for example, individuals who are currently disbarred, suspended, or disqualified from practice before the IRS—may not obtain a Record of Completion or be listed in the Directory of Federal Tax Return Preparers. *See id.* § 4.06(1).

41. Not all tax return preparers are required to complete the refresher course. Notably, anyone who complied with the RTRP rule does not need to complete the refresher course or related test. *See* Internal Revenue Serv., *IRS Unveils Filing Season Program for Tax Return Preparers*, *available at* http://www.irs.gov/uac/Newsroom/IRS-Unveils-Filing-Season-Program-for-Tax-Return-Preparers,-Answers-Frequently-Asked-Questions. Thus, the new rule is knit into the RTRP rule invalidated in *Loving*. In addition, attorneys, CPAs, enrolled agents, and tax return preparers licensed by a state are not required to complete the refresher course or related test. *See* Rev. Proc. 2014-42 § 4.05(2)(b).

42. The continuing education component varies depending on whether a tax return preparer is required to complete the refresher course. Unenrolled tax return preparers—who are required to complete the course—must annually complete 18 hours of continuing education from

an IRS-approved continuing education provider. The rule provides that, of those 18 hours, 10 hours must be in "Federal tax law topics," six hours must be in "Federal tax law updates," and two hours must be in ethics or professional responsibility. *See id.* § 4.05(3)(a).

43. Those who are not required to complete the refresher course are required to complete 15 hours of continuing education. Of those 15 hours, 10 hours must be in "Federal tax law topics," three hours must be in "Federal tax law updates," and two hours must be in ethics or professional responsibility. *See id.* § 4.05(3)(b).

44. The AFS rule will go into effect for the 2015 calendar year. To help implement the rule on short notice, the IRS has provided for a "transition rule" with regard to the continuing education requirement. Under the transition rule, unenrolled tax return preparers must complete 11 hours of continuing education in 2014 to be eligible to obtain a Record of Completion and a place in the Directory of Federal Tax Return Preparers for the 2015 calendar year. *See id.* § 4.05(c). Of those 11 hours, the refresher course will count as six hours and the remaining five hours must consist of three hours of "Federal tax law topics" and two hours of ethics or professional responsibility. *See id.*

45. All other categories of tax return preparers must complete eight hours of continuing education in 2014. Of those eight hours, three must be in "Federal tax law topics," three must be in "Federal tax law updates," and two must be in ethics or professional responsibility. *See id.*

IV. THE IRS LACKS STATUTORY AUTHORITY FOR THE ANNUAL FILING SEASON RULE

46. As the courts have concluded, the IRS lacks statutory authority to regulate tax return preparers. In issuing the RTRP rule, the IRS purported to rely on 31 U.S.C. § 330, which grants the IRS authority to "regulate the practice of representatives of persons before the

Department of the Treasury." 31 U.S.C. § 330. Because the IRS is a part of the Department of the Treasury, Section 330 grants the IRS authority to regulate "representatives" who "practice before" the IRS.

47. As the courts held, however, tax return preparers are not "representatives" of taxpayers and do not "practice before" the IRS. *See Loving*, 742 F.3d at 1016-19. Accordingly, the IRS has no authority under Section 330 to regulate tax return preparers as it purports to do under the AFS rule. And, in issuing the AFS rule, the IRS has not identified any other statutory authority that supports its action.

48. Because the IRS lacks statutory authority to regulate tax return preparers, the AFS rule violates the APA. *See* 5 U.S.C. § 706(2)(C); *Loving*, 917 F. Supp. 2d. at 69 ("Agency action, however, requires statutory authority.").

V. THE ANNUAL FILING SEASON RULE IS AN IMPERMISSIBLE END RUN AROUND *LOVING*

49. The Court in *Loving* concluded that "[i]t might be that allowing the IRS to regulate tax-return preparers more stringently would be wise as a policy matter," but noted "that is a decision for Congress and the President to make if they wish by enacting new legislation." *Loving*, 742 F.3d at 1022. The AFS rule ignores that warning by implementing a rule that is nearly identical to the rule invalidated in *Loving*.

50. The RTRP rule required participants to pass a 100-question examination; the AFS rule requires participants to pass an examination with at least 100 questions. *Compare* Internal Revenue Serv., *Registered Tax Return Preparer Test: Candidate Information Bulletin*, at 4 (Apr. 16, 2012), *available at* http://www.irs.gov/pub/irs-utl/rtrpcandidateinfobulletin.pdf *with* Rev. Proc. 2014-42, § 4.05(2)(a). The RTRP rule required participants to complete 15 hours of continuing education programs each year; the AFS rule requires participants to complete

between 15 and 18 hours of continuing education programs each year. *Compare* 76 Fed. Reg. at 32,290 *with* Rev. Proc. 2014-42, § 4.05(3). Finally, the RTRP rule required participants to pass a character and fitness assessment; similarly, the AFS rule disqualifies certain individuals from participating based on prior unethical or illegal conduct. *Compare* 76 Fed. Reg. at 32,290 *with* Rev. Proc. 2014-42, § 4.06.

51. Indeed, the IRS itself seems to view the AFS rule as indistinguishable from the RTRP rule because the AFS rule exempts anyone who complied with the RTRP rule from the refresher course. *See* Internal Revenue Serv., *IRS Unveils Filing Season Program for Tax Return Preparers*, *available at* http://www.irs.gov/uac/Newsroom/IRS-Unveils-Filing-Season-Program-for-Tax-Return-Preparers,-Answers-Frequently-Asked-Questions. As a result, the AFS rule groups tax return preparers who complied with the RTRP rule alongside attorneys, CPAs, and enrolled agents.

52. The only difference in substance between the RTRP rule invalidated in *Loving* and the AFS rule is that the RTRP rule required payment of an application fee and the AFS rule does not require payment of an application fee.

53. The AFS rule is purportedly "voluntary." *See* Rev. Proc. 2014-42, §§ 1, 3. But the IRS's own statements demonstrate that the AFS rule is *de facto* mandatory.

54. Commissioner Koskinen perhaps put it most clearly when he stated that tax return preparers who obtain a Record of Completion and an entry in the Directory of Federal Tax Return Preparers will "stand out from the competition by giving them a recognizable record of completion that they can show to their clients." Stephen Ohlemacher, *supra* p. 4 (internal quotation marks omitted). In the same vein, the IRS has explained that the AFS rule is "designed to encourage tax return preparers who are not attorneys, CPAs, or EAs [enrolled agents] to

improve their knowledge of federal tax law." Rev. Proc. 2014-42, § 2. As the IRS acknowledges, consumers will think that tax return preparers who obtain a Record of Completion "have a better understanding of the tax law necessary to represent a taxpayer before the IRS during an examination than an unenrolled individual who has not taken any continuing education courses related to federal tax law." *Id.*

55. As a result, there will be a strong competitive incentive for tax return preparers to comply with the AFS rule. Tax return preparers who do not comply with the rule will risk losing business, as their competitors will be able to market their place in the Directory of Federal Tax Return Preparers and their Record of Completion to prospective clients. The end result is that the AFS rule is mandatory in effect. That result would clearly contravene the Court's warning that future regulation of unenrolled tax return preparers should occur only through additional legislation. It also undermines Congress's authority to determine whether to provide the IRS with the requested authority to regulate tax return preparers. As the D.C. Circuit has explained, if an agency pronouncement "is voluntary in name only, then the agency is making substantive law." *Renal Physicians Ass'n v. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1273 (D.C. Cir. 2007).

VI. THE IRS WAS REQUIRED TO PROVIDE AN OPPORTUNITY FOR PUBLIC COMMENT

56. The IRS claims that it is not required to provide for notice and comment in issuing the AFS rule. Pursuant to the APA, an agency must provide for notice and comment except when issuing a procedural rule, an interpretive rule, or a general statement of policy or upon a showing of "good cause." *See* 5 U.S.C. § 553(b). The IRS does not contend that the "good cause" exception applies. Therefore, unless the AFS rule is a procedural rule, an

interpretive rule, or a general statement of policy, the IRS was required to provide for notice and comment.

57. The AFS rule is not a procedural rule. In general, "a procedural rule does not itself alter the rights or interests of parties" but instead alters "the manner in which . . . parties present themselves or their viewpoints to the agency." *See Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 653 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citation omitted). The AFS rule does not fit this description. In addition, the IRS's public statements on the scope of the AFS rule have focused on the substantive policy merits of various approaches, which the D.C. Circuit has explained is a hallmark of a substantive rule. *Id.* at 6.

58. The AFS rule is not an interpretive rule. Interpretive rules "advis[e] the public of [an agency's] current understanding" of its statutory mandate. *Id.* But the AFS rule is not an effort to clarify the IRS's existing statutory authority. Rather, it creates additional regulatory criteria applicable to tax return preparers.

59. The AFS rule is not a general statement of policy. Rather, it is a *de facto* rule that must be issued pursuant to notice and comment, *see Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006), because it is "binding *as a practical matter*" and requires the IRS to confer benefits on tax return preparers who comply with the rule. *Gen. Electric Co. v. EPA*, 290 F.3d 377, 382-83 (D.C. Cir. 2002) (emphasis added).

60. Indeed, despite calculated suggestions that the AFS rule is "voluntary," the Revenue Procedure implementing the AFS rule has the hallmarks of a binding rule. For example, the Revenue Procedure describes the requirements necessary to obtain a Record of Completion and a place in the Directory of Federal Tax Return Preparers for 2015 as the IRS "transition rule." *See* Rev. Proc. 2014-42, § 5(3)(c). The AFS rule also includes an "effective

date." *See id.* § 9. And the rule requires the IRS to provide procedural rights to applicants if it seeks to revoke a participant's Record of Completion or place in the Directory of Federal Tax Return Preparers or if it seeks to disqualify an applicant for prior bad conduct. *See id.* § 7. As the D.C. Circuit has held, action that binds an agency's discretion in this manner is a rule, not something else. *See McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1320 (D.C. Cir. 1988). Put simply, the IRS may not avoid the APA's notice and comment requirements by labeling the AFS rule "voluntary" or issuing it as a Revenue Procedure.

61. The IRS cannot circumvent the APA's notice and comment requirements by labeling a rule as "voluntary." To do so would undermine the efficacy of the notice and comment requirements and enable an agency to proceed without responding to and benefiting from public comment. Moreover, in issuing the RTRP rule, the IRS provided for notice and comment and acknowledged that it had to comply with the Paperwork Reduction Act, the Small Business Regulatory Enforcement Act (which themselves contain notice and comment periods), and Executive Order 12,866. By labeling the AFS rule "voluntary," the IRS is separately circumventing each of these important procedural limits to its authority.

VII. THE ANNUAL FILING SEASON RULE VIOLATES THE APA BECAUSE IT IS ARBITRARY AND CAPRICIOUS

62. The AFS rule is arbitrary and capricious because it "entirely fail[s] to consider an important aspect of the problem[s]" related to tax return preparers and "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Further, the IRS has not sufficiently considered "reasonably obvious alternative rules." *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 797 (D.C. Cir. 1984) (internal quotation marks, citation, and ellipsis omitted).

63. The AFS rule will confuse consumers. It creates four new categories (for a total of eight) of tax return preparers among which consumers will have to distinguish (unenrolled tax return preparers, unenrolled tax return preparers who comply with the rule, enrolled agents, enrolled agents who comply with the rule, CPAs, CPAs who comply with the rule, attorneys, and attorneys who comply with the rule). In addition, although the IRS has cautioned tax return preparers that they are not permitted to "in any way imply an employer/employee relationship with the IRS or make representations that the IRS has endorsed the tax return preparer," Rev. Proc. 2014-42, § 4.07, most consumers will nonetheless conclude that the IRS has endorsed tax return preparers who have complied with the AFS rule. Indeed, Commissioner Koskinen has emphasized that the Record of Completion and listing in the Directory of Federal Tax Return Preparers can be used as a means by which tax return preparers can market themselves. It is undoubtedly the case that the IRS-issued Record of Completion and a place in the Directory of Federal Tax Return Preparers have value, otherwise the IRS would not emphasize that they will be useful in attracting clients.

64. Moreover, the rule does not address the problem of unethical or fraudulent tax return preparers. The AICPA has raised these concerns with the IRS, but the IRS has not addressed them.

65. Finally, the IRS has not sufficiently considered alternative methods of ensuring that tax return preparers are qualified and competent. The AICPA has sought to work with the IRS to achieve workable solutions to this issue, including noting that the IRS has an array of penalties—including criminal penalties—it can levy against unethical and incompetent tax return preparers. *See* 26 U.S.C. §§ 6694, 6695, 6701, 6713, 7206, 7407. But the IRS has simply dismissed all alternatives out of hand, determined to forge ahead with its preferred option.

66. The AICPA raised each of these concerns in meetings with IRS officials and in a letter to Commissioner Koskinen. Had the IRS provided a comment period, it would have been forced to respond to the AICPA's concerns. *See, e.g.*, *Int'l Fabricare Inst. v. EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) ("We will . . . overturn a rulemaking as arbitrary and capricious where the [agency] has failed to respond to specific challenges that are sufficiently central to its decision.").

67. If allowed to proceed, the AFS rule will cause significant harm. By creating four new categories (for a total of eight) of tax return preparers, the rule will confuse consumers seeking assistance in preparing their taxes and increase the likelihood that consumers will hire a tax return preparer who is not best-suited to prepare their returns. If a taxpayer's returns are inaccurate, the taxpayer is ultimately liable for repaying the IRS with interest. In addition, the rule will impose additional regulatory burdens and costs (such as the cost of paying for continuing education programs) on tax return preparers.

COUNT I
(No Statutory Authority)

68. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

69. The AFS rule constitutes final agency action, and the AICPA's members are adversely affected and aggrieved by the AFS rule.

70. The AFS rule exceeds the IRS's statutory jurisdiction and authority.

71. Accordingly, the AFS rule is in excess of statutory authority, jurisdiction, and limitations, in violation of 5 U.S.C. § 706(2)(C), and is not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

COUNT II
(Denial Of Notice And Comment Rights)

72. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

73. The AICPA, its members, and other members of the public were not afforded an adequate opportunity to comment on critical features of the AFS rule because the IRS did not provide for a comment period. The AFS rule does not satisfy any of the exceptions to the notice and comment requirements established by 5 U.S.C. § 553(b). The IRS has not claimed that the "good cause" exception applies and the AFS rule is not a procedural rule, interpretive rule, or general statement of policy. Rather, it is a *de facto* rule that must be issued pursuant to notice and comment.

74. Therefore, the AFS rule was promulgated "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), and is not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

COUNT III
(Arbitrary And Capricious In Violation of the APA)

75. Plaintiff incorporates the preceding paragraphs as if fully set forth herein.

76. The AFS rule is arbitrary and capricious. Among other things, the IRS failed to engage in reasoned decision-making; failed to consider important aspects of the problem it believed it faced; and failed to sufficiently consider alternative methods of ensuring that tax return preparers are qualified and competent.

77. Accordingly, the AFS rule is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in violation of 5 U.S.C. § 706(2)(A).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Declare the AFS rule unlawful.

2. Vacate and set aside the AFS rule.

3. Declare that any action taken by Defendants pursuant to the AFS rule is null and void.

4. Enjoin Defendants and their officers, employees, and agents from implementing, applying, or taking any action whatsoever pursuant to the AFS rule.

5. Issue all process necessary and appropriate to postpone the effective date of the AFS rule and to maintain the status quo pending the conclusion of this case.

6. Award Plaintiff its costs and reasonable attorneys' fees as appropriate.

7. Grant such further and other relief as this Court deems proper.

Respectfully submitted,

Dated: July 15, 2014

/s/ Douglas R. Cox

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