

REVOCATION AND SUSPENSION OF CERTIFIED
PROFESSIONAL EMPLOYER ORGANIZATIONS: AN
ASSESSMENT

*By: Ursula Ramsey**

I. IMPETUS	158
II. REVOCATION AND SUSPENSION OF CPEO CERTIFICATION: AN OVERVIEW OF THE PROCESS	160
<i>A. Obtaining and Maintaining CPEO Certification</i>	160
<i>B. Reasons for Suspension or Revocation of CPEO Certification.</i>	162
<i>C. The CPEO Suspension and Revocation Process</i>	163
<i>D. Consequences of CPEO Suspension.....</i>	164
<i>E. Consequences of CPEO Revocation</i>	165
<i>F. Voluntary Termination of Certification.....</i>	165
III. DATA FROM THE CPEO PUBLIC LISTINGS	167
<i>A. Statutory Requirements for CPEO Public Listings.....</i>	167
<i>B. Data from the CPEO Public Listings.....</i>	168
1. Illustration: The Revocation of Five Related CPEOs.....	168
2. Illustration: A PEO's Delayed Financial Audit Review Triggers Revocation	170
3. Illustration: An Additional Test of the IRS's Revocation Procedures	171
4. The Most Recent Test of the Revocation Procedures	171
5. Illustration: An Earlier Test of the CPEO Program's Suspension Procedures.....	172
6. Analysis of CPEO Revocation Data	173
IV. IMPLICATIONS AND OPPORTUNITIES	173
V. CONCLUSION	176

* Assistant Professor of Business Law, Cameron School of Business, University of North Carolina Wilmington.

Each year, 627,000 small businesses open, contributing to the just over thirty-two million small businesses operating in the United States.¹ These small businesses (businesses with fewer than 500 employees) are employment engines, as small businesses provide two-thirds of net new jobs.² Recently, a growing number of small businesses receive support from a behind-the-scenes partner: a professional employer organization (“PEO”). A PEO is a business that provides human resources and employment tax services to its client companies.³ In fact, more than fifteen percent of businesses with ten to ninety-nine employees receive support from a PEO.⁴

A key way in which a PEO serves its client companies is by issuing payroll and remitting employment tax payments.⁵ Employers must issue payroll to employees, withhold taxes from those wages, and remit employment taxes; by using a PEO, the employer can turn over those responsibilities, as well as other human resources responsibilities, to a company that specializes in the area.⁶ This is valuable because it allows

1. *Small Business Statistics*, CHAMBER OF COM., <https://www.chamberofcommerce.org/small-business-statistics/> (last visited Feb. 18, 2023); *2020 Small Business Profile*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf> (last visited Sept. 7, 2021).

2. Press Release, Jason Boré, OFF. OF ADVOC., *Small Businesses Generate 44 Percent of U.S. Economic Activity*, U.S. SMALL BUS. ADMIN., (Jan. 30, 2019), <https://advocacy.sba.gov/2019/01/30/small-businesses-generate-44-percent-of-u-s-economic-activity/>; *2020 Small Business Profile*, *supra* note 1.

3. *What is a PEO*, NAPEO, <https://www.napeo.org/what-is-a-peo> (last visited Jan. 10, 2022).

4. *What is a PEO*, *supra* note 3.

5. *Id.*

6. Press Release, Treasury Inspector General for Tax Administration, Further Actions are Needed to Reduce the Risk of Employment Tax Fraud to Businesses That Use the Services of Professional Employer Organizations, TIGTA-2017-21 (Sept. 18, 2017) [hereinafter TIGTA Press Release], <https://content.govdelivery.com/accounts/USTREASTIGTA/bulletins/1b7cf41>. To better understand the PEO concept, it is helpful to distinguish a PEO from these other service providers. A payroll service provider, as the name suggests, helps a company process its payroll and meet its employment tax obligations. See *Employers' use of Payroll Service Providers*, I.R.S., FS 2020-12 (Aug. 2020), <https://www.irs.gov/newsroom/employers-use-of-payroll-service-providers> [hereinafter I.R.S., FS 2020-12]; see also I.R.S. News Release IR-2020-186 (Aug. 19, 2020) (describing the distinction between payroll service providers and reporting agents). A payroll service provider manages garnishments, calculates payroll, and can even handle employees' time and attendance records. *What is a Payroll Service Provider?*, ADP, <https://www.adp.com/resources/articles-and-insights/articles/w/what-is-a-payroll-service-provider.aspx> (last visited Feb. 18, 2023). While a PEO may provide payroll services, a PEO goes beyond a payroll service provider in the HR services it may provide. I.R.S. FS 2020-12, *supra*. Another distinction is that PEOs operate via a co-employment model, while payroll service providers do not. *Id.* In addition to payroll service providers, it is also important to distinguish PEOs from temporary staffing services. The hallmark of a temporary staffing service is supplying short-term labor “to clients to support or supplement the client’s workforce in special work situations, such as employee absences, temporary skill shortages or seasonal workloads.” *FAQs*, NAPEO, <https://www.napeo.org/what-is-a-peo/selecting-a-peo/faqs> (last visited Feb. 18, 2023); see also

the client company to focus on its core business without ceding time to the administrative burdens of employment tax compliance and human resources demands; meanwhile, the PEO is able to exercise its employment tax and human resources expertise for its client's benefit.⁷ In 2020, nearly 4 million employees, earning \$216 billion, received paychecks via the work of a PEO.⁸

As the PEO industry is a relatively young industry (with origins in the late 1970s and early 1980s), its regulatory regime continues to evolve.⁹ A key piece of that regulatory regime was added in 2014 when Congress passed the Small Business Efficiency Act that paved the way for the development of a voluntary Internal Revenue Service ("IRS") certification program for PEOs.¹⁰ When introduced in the Senate, the bill sponsor's remarks made clear that the legislation's purpose was to protect small businesses.¹¹ The voluntary PEO certification program offers this protection by clarifying that IRS-certified PEOs ("CPEOs") could definitively assume employment tax liability for their PEO

Jack N. Kondrasuk et al., *The Dangers of Misclassifying "Employees": Microsoft Litigation Emphasizes Distinctions Between Employees and Nontraditional Workers*, 13 EMP. RESP. & RIGHTS J. 165, 167 (2001) (explaining that a worker for a temporary staffing company is different from "direct-hire temp," a worker who is hired by a company to work for that particular company for a limited period of time). The worker works at the client site, and the client provides information on hours worked to the temporary staffing service, who generates a paycheck for the worker and an invoice to the client. EDWARD A. LENZ, CO-EMPLOYMENT: EMPLOYER LIABILITY ISSUES IN THIRD-PARTY STAFFING ARRANGEMENTS 5 (7th ed. 2011). While temporary staffing services provide temporary labor, PEOs do not operate on this type of short-term basis. John M. Polson, *The PEO Phenomenon: Co-Employment at Work*, 27 EMP. REL. L. J. 7, 8 (2002); *FAQs, supra*. Also, in contrast to the utilization of a co-employment model by PEOs, temporary staffing service workers remain the employees of the temporary staffing service and are not co-employed by the worksite employer. Kondrasuk et al., *supra*, at 168.

7. See Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 650-51 (2012); *Overview*, NAPEO, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/napeo-white-papers/overview> (last visited Feb. 18, 2023); *What is a PEO, supra* note 3.

8. LAURIE BASSI & DAN McMURRER, THE PEO INDUSTRY FOOTPRINT 2021, NAT'L ASS'N OF PRO. EMP. ORG. 1 (2021).

9. *Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements*, Nat'l Ass'n of Ins. Comm'r 2 (Oct. 2010), <https://content.naic.org/sites/default/files/GL1950.pdf>; Britton Lombardi & Yukako Ono, *Professional Employer Organizations: What are They, Who Uses Them, and Why Should We Care?*, 32 ECON. PERSPS. 2, 3 (2008).

10. Press Release, Engage PEO, *Congress Recognizes Professional Employer Organizations Through Small Business Efficiency Act* (Dec. 17, 2014) <https://www.engagepeo.com/congress-recognizes-professional-employer-organizations-through-small-business-efficiency-act>.

11. See 159 CONG. REC. S1234 (daily ed. Mar. 6, 2013) (statement of Sen. Charles Grassley).

clients.¹² The first CPEOs obtained certification effective January 1, 2017.¹³

Just as Internal Revenue Code section 7705 sets forth the requirements for a PEO to obtain and maintain IRS certification,¹⁴ it also provides for the IRS's authority to revoke a CPEO's certification in certain circumstances.¹⁵ Now, six years into the certification program, the IRS has mobilized the CPEO program's suspension and revocation procedures.¹⁶ Legislation requires that the IRS maintains a current listing of CPEOs, revoked CPEOs, and suspended CPEOs to provide a public portal into the CPEO program.¹⁷ Thus, this article analyzes CPEO revocation data to gain insight into the IRS's oversight of certified PEOs. While it is promising for the CPEO program's success that comparatively few CPEOs have faced revocation, this article offers suggestions for increased transparency to further the goal of protecting small businesses who seek the services of PEOs.

Part I discusses the impetus for the CPEO legislation. Part II presents the procedures for suspension and revocation of CPEOs. Part III dives into current revocation data from the IRS's public CPEO listings. Finally, Part IV discusses implications and opportunities.

I. IMPETUS

At the outset, it is necessary to understand a bit of background regarding the impetus for the Small Business Efficiency Act and the CPEO program. Two key motivations drove the CPEO program's creation. First, incorporating PEOs into the Internal Revenue Code provides added credibility to the PEO industry in the eyes of investors, regulators, and PEOs' small business clients.¹⁸ Obtaining IRS certification carries weight.

Second, the legislation established that IRS-certified PEOs could definitively assume employment tax liability for their PEO clients

12. See I.R.C. § 3511(c)(1) (2021); see also 159 CONG. REC. S1234 (daily ed. Mar. 6, 2013) (statement of Sen. Charles Grassley).

13. See *List of CPEOs*, IRS, <https://www.irs.gov/pub/irs-utl/list-of-cpeos.pdf> (Feb. 22, 2023).

14. I.R.C. § 7705(b).

15. I.R.C. § 7705(d).

16. See *List of Revoked CPEOs*, IRS, <https://www.irs.gov/pub/irs-utl/revoked-cpeos.pdf> (Jan 3, 2023).

17. See *CPEO Public Listings*, IRS, <https://www.irs.gov/tax-professionals/cpeo-public-listings> (Feb. 22, 2023).

18. See *IRS Certification*, NAPEO, <https://www.napeo.org/advocacy/what-we-advocate/federal-government-affairs/irscertification> (last visited Feb. 18, 2023); see also Brad Buttermore, *Consolidation in the PEO Industry Continues to Accelerate*, PEO INSIDER, Dec. 2018–Jan. 2019, at 28, 28–30 (discussing investment in the PEO industry).

(assuming certain requirements are met).¹⁹ This is important because within the PEO industry there has existed a small handful of PEOs who have committed employment tax fraud.²⁰ For that small number of unscrupulous PEOs, a common template was to accept employment tax payments from the client company without forwarding those payments on to the IRS; eventually, the client company would learn that they remained liable to the IRS for the employment tax payments, even though they had remitted previously the amount to their PEO.²¹ The PEO industry has worked hard to distance itself from those few unscrupulous PEOs, as exemplified by its push for regulation such as this federal certification program.²² Still, courts continue to manage the fallout of such cases. For instance, in July 2021, the United States District Court for the Eastern District of Tennessee considered a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 made by the owner of a corporation that operated PEOs via subsidiaries.²³ The opinion describes that the owner collected over ten million dollars of payroll taxes that were not remitted to the IRS; instead, the opinion notes that the owner converted the money for personal use.²⁴ In addition, the opinion describes that the conspiracy involved the PEO failing to purchase worker's compensation coverage for which it accepted premium payments from the PEO clients.²⁵ That owner previously pled guilty to one count of tax evasion and one count of conspiracy to commit mail and wire fraud and received a ninety-six-month prison sentence.²⁶ In addition to that example, earlier, in August 2020, the IRS issued a news release cautioning businesses who outsource payroll.²⁷ In that news release, the IRS specifically warned against third-party service providers (such as non-certified PEOs) who might fail to remit payroll taxes that had been paid to the providers previously.²⁸ It also highlighted CPEO utilization as a way to reduce that risk.²⁹

19. I.R.C. § 3511(c)(1); *see* 159 CONG. REC. S1234 (daily ed. Mar. 6, 2013) (statement of Sen. Charles Grassley).

20. TIGTA Press Release, *supra* note 6, at 8.

21. *Id.* at 8–9.

22. Louis Basso, *Why the IRS' Voluntary Certification Program for Professional Employer Organizations Matters*, TJB AM. BUS. MAG. (Apr. 16, 2018), <https://www.americanbusinessmag.com/208/04/why-the-irs-voluntary-certification-program-for-professional-employer-organizations-matters/>.

23. *Rudd v. United States*, Nos. 3:18-CV-436, 3:17-CR-11, 2021 WL 3160490, at *1 (E.D. Tenn. July 26, 2021).

24. *Id.*

25. *Id.*

26. *Id.*

27. I.R.S. News Release IR-2020-186 (Aug. 19, 2020).

28. *Id.*

29. *Id.*

By establishing, via statute, that employment tax liability shifts from the client company to its CPEO, CPEO clients are largely safeguarded from this risk.³⁰ As explained in the Small Business Efficiency Act's introduction in the Senate, "[t]his [legislation] will give small businesses peace of mind that their human resources and employment tax responsibilities are taken care of so they can focus on their core business and create more jobs."³¹ It should be noted that, although the Small Business Efficiency Act passed in 2014, the first CPEOs actually obtained certification effective January 1, 2017.³²

II. REVOCATION AND SUSPENSION OF CPEO CERTIFICATION: AN OVERVIEW OF THE PROCESS

A. Obtaining and Maintaining CPEO Certification

Before discussing the CPEO program's suspension and revocation procedures, as well as its voluntary termination provision, it is useful to understand the process by which a CPEO obtains and, more importantly, maintains certification. Internal Revenue Code § 7705(b) sets out those requirements.³³ It is important to highlight at the outset that many of these requirements are ongoing. In other words, maintaining certification requires administrative resources beyond the initial application process.

First, to obtain certification, the PEO, along with its owners, officers, and other parties, must satisfy suitability requirements related to background, business location, and tax status.³⁴ For instance, the regulations specify that the CPEO must be a U.S. company and the CPEO must have a physical business location in the United States.³⁵ Also, a majority of the CPEO's responsible individuals must be U.S. citizens or residents.³⁶ The CPEO and its responsible individuals may be vetted through criminal background, tax compliance, and credit history checks.³⁷

30. TIGTA Press Release, *supra* note 6, at 8.

31. 159 CONG. REC. S1234 (daily ed. Mar. 6, 2013) (statement of Sen. Charles Grassley).

32. *See List of CPEOs, supra* note 13.

33. I.R.C. § 7705(b).

34. *Id.* § 7705(b)(1).

35. Treas. Reg. § 301.7705-2(d)(1)-(2) (2019).

36. Treas. Reg. § 301.7705-2(d)(3) (2019). The regulations define who is a "responsible individual." *See* Treas. Reg. § 301.7705-1(b)(13) (2019). That definition of responsible individual includes, for example, the sole proprietor of a sole proprietorship, a general partner in a general partnership, any director or officer, the person "with primary responsibility for the organization's federal employment tax compliance," and anyone "who, regardless of title, has ultimate responsibility for implementing the decisions of the organization's governing body." *See id.*

37. Treas. Reg. § 301.7705-2(c)(1)-(2) (2019).

Second, to obtain certification, the Code provides requirements for bonding and financial review of the CPEO.³⁸ The CPEO must post a bond for the payment of taxes, the amount of which is the greater between \$50,000 or five percent of the organization's section 3511 tax liability for the preceding calendar year.³⁹ The amount of the required bond should not exceed \$1,000,000.⁴⁰ The financial review requirements include provisions related to financial statements and quarterly assertions and attestations.⁴¹ Each calendar quarter, a responsible individual for the CPEO must provide a signed assertion to the IRS that the CPEO has withheld and paid all federal employment taxes.⁴² The regulations require that a CPA's examination level attestation back-up that assertion.⁴³ In addition, each calendar quarter, the CPEO must provide a statement that the CPEO has positive working capital.⁴⁴ A CPEO must provide to the IRS its annual audited financial statements within six months of the end of the fiscal year.⁴⁵ Along with its audited financials, the CPEO must also provide a CPA opinion that such financial statements comply with GAAP and are fairly presented.⁴⁶ The CPA opinion must state that the audited financials reflect positive working capital (unless the CPEO meets the working capital exception in Treasury Regulation section 301.7705-2(e)(3)).⁴⁷

Third, the Code also imposes reporting obligations on the CPEO.⁴⁸ One such reporting obligation requires the CPEO to report to the IRS when any CPEO service contract begins or ends.⁴⁹ A CPEO contract is the agreement between the CPEO and its client company, and its requirements are set out in the Code.⁵⁰ The reporting obligation also

38. See I.R.C. § 7705(b)(2).

39. *Id.* § 7705(c)(2)(B).

40. *Id.*

41. I.R.C. § 7705(c)(3).

42. Treas. Reg. § 301.7705-2 (2019).

43. *Id.*

44. Treas. Reg. § 301.7705-2(f)(1)(ii) (2019). The regulations address the situation in which a CPEO may have negative working capital. Treas. Reg. § 301.7705-2(f)(2)(ii) (2019). In that case, "[a] CPEO with negative working capital at the end of a fiscal quarter will not fail to meet the requirements [] of this section if - (A) The CPEO does not have negative working capital at the end of the two fiscal quarters immediately preceding such fiscal quarter...; (B) The CPEO provides an explanation to the IRS describing the reason for such negative working capital...; and (C) The IRS determines, in its sole discretion, that the negative working capital does not present a material risk to the IRS's collection of federal employment taxes." *Id.*

45. Treas. Reg. § 301.7705-2(e)(1) (2019).

46. *Id.*

47. *Id.* But see Treas. Reg. § 301.7705-2(e)(3) (2019) (discussing an exception to the positive working capital requirement).

48. I.R.C. § 7705 (b)(3).

49. I.R.C. § 3511(g)(1); Treas. Reg. § 31.3511-1(g)(3)(i) (2019).

50. Treas. Reg. § 301.7705-1(b)(3) (2019). The regulations provide, in part, that the CPEO contract must be in writing and must set forth that the CPEO will pay wages and employment taxes

applies to any service agreement set out in Treasury Regulation section 31.3504-1(g)(3)(i).⁵¹ In that section, a service agreement is defined as an agreement under which the payor agrees to pay wages and employment taxes as the employer or co-employer of its clients' workers.⁵²

Fourth, the Code provides that the CPEO must use an accrual method of accounting (unless otherwise approved by the Secretary).⁵³ Fifth, the Code sets out a requirement for periodic verifications, and sixth, the Code provides for notification by the CPEO of material changes.⁵⁴

The effective date of the Department of the Treasury's final regulations for CPEOs was May 28, 2019.⁵⁵ The final regulations explained that many requirements of CPEO certification were practices that the PEO already likely had in place, as many of the federal CPEO certification requirements exhibited similarity to state-level PEO certification requirements.⁵⁶ As the foregoing demonstrates, however, obtaining certification by the IRS as a CPEO requires a robust presentation of a PEO's trustworthiness, reliability, and financial wherewithal.

B. Reasons for Suspension or Revocation of CPEO Certification

Having just established the process by which a CPEO obtains and maintains its IRS certification, the query now turns to how a CPEO's certification could become jeopardized. The underlying standard for revoking or suspending CPEO status is whether there exists "a material risk to the IRS's collection of federal employment taxes."⁵⁷ To that end, Treasury Regulation section 301.7705-2(c)(1) provides a list of reasons for which the IRS might suspend or revoke a CPEO's certification.⁵⁸ One reason for suspension or revocation provided by that regulation is the CPEO's, related entity's, precursor entity's, or responsible individual's failure to pay taxes or file returns.⁵⁹ A second reason is a criminal charge

regardless of if the CPEO's client company first remits that payment to the CPEO. *Id.* Importantly, the CPEO contract must also set forth that the CPEO "[a]gree[s] to be treated as a CPEO for purposes of section 3511." *Id.*

51. Treas. Reg. § 31.3511-1(g)(3)(i) (2019).

52. Treas. Reg. § 31.3504-2(b)(2)(i) (2019).

53. I.R.C. § 7705(b)(4).

54. *Id.* at (5)-(6).

55. Certified Professional Employer Organizations, 84 Fed. Reg. 24367, 24367 (May 28, 2019) (to be codified at 26 C.F.R. pts. 31, 301, 602).

56. *See id.* at 24379.

57. Treas. Reg. § 301.7705-2(b) (2019).

58. Treas. Reg. § 301.7705-2(c)(1) (2019).

59. *Id.* § 301.7705-2(c)(1)(i) (2019).

or conviction of the CPEO, a responsible individual, precursor entity, or related entity.⁶⁰ A third reason is an active IRS criminal investigation of the CPEO, a related entity, a precursor entity, or a responsible individual.⁶¹ The sanctioning or the denial, suspension, or revocation of a license, registration, or accreditation of the CPEO, related entity, precursor entity, or responsible individual due to dishonesty or fraud provides the fourth reason.⁶² The CPEO could also face revocation or suspension due to lacking a history of financial responsibility by either the CPEO or a related entity, precursor entity, or responsible individual.⁶³ Likewise, the CPEO could jeopardize its certified status if the CPEO, related entity, precursor entity, or responsible individual provides false or misleading information to the IRS or if they are included on the Office of Foreign Assets Control's sanctions list.⁶⁴ Finally, that regulation provides that the CPEO could lose its certification for lacking knowledge of payroll processing or employment tax reporting and withholding.⁶⁵

Revenue Procedure 2017-14 adds other possible reasons for suspension or revocation: (1) The CPEO's failure to timely submit its annual verification, audited financials with a CPA opinion, or quarterly assertions, attestations, and working capital statements; (2) A failure to satisfy the bond requirements; (3) The CPEO's failure to satisfy its reporting requirement (including notification of material changes); and (4) The presence of errors or omissions in the CPEO's submitted audited financials or working capital statements.⁶⁶ The regulations make clear that the IRS will consider the CPEO's past failures to meet the program's requirements in its decision, as well as the conduct of related entities (as reflected above).⁶⁷

C. The CPEO Suspension and Revocation Process

If one of those reasons for suspension or revocation of CPEO status is present, then the suspension and revocation process begins by the IRS issuing a notice of suspension and proposed revocation to the CPEO.⁶⁸ That notice will explain the reason(s) behind the suspension and will explain to the CPEO that it may request review.⁶⁹ If the CPEO does not

60. *Id.* § 301.7705-2(c)(1)(ii) (2019).

61. *Id.*

62. *Id.* § 301.7705-2(c)(1)(iii) (2019).

63. *Id.* § 301.7705-2(c)(1)(v) (2019).

64. *Id.* § 301.7705-2(c)(1)(vii), (iv) (2019).

65. *Id.* § 301.7705-2(c)(1)(vii)(A)-(B) (2019).

66. Rev. Proc. 2017-14, 2017-3 I.R.B. 434.

67. Treas. Reg. § 301.7705-2(b) (2019).

68. Rev. Proc. 2017-14, 2017-3 I.R.B. 434.

69. *Id.*

request review within thirty days of the effective date of the notice of proposed revocation, the IRS will issue a notice of final revocation to the CPEO.⁷⁰

However, if the CPEO requests review of its suspension and proposed revocation, it must request it in writing within thirty days of the effective date of the notice of proposed revocation.⁷¹ Revenue Procedure 2017-14 explains that the request for review must contain a position statement by the CPEO in which it presents its legal response along with a discussion of how it either has remedied or intends to remedy the issue(s) noted in the IRS notice and how it will prevent the issue(s) in the future.⁷² The first step in the review process is the CPEO program office.⁷³ Based on its assessment of whether the CPEO has cured (or will cure) the failure(s) and prevent the reoccurrence, the CPEO program office will either (a) lift the suspension or (b) forward the matter to the IRS Office of Professional Responsibility.⁷⁴

If the CPEO program office does not lift the suspension on its assessment that the failure(s) can be cured and prevented, then the IRS Office of Professional Responsibility will review the matter using an abuse of discretion standard.⁷⁵ If the IRS Office of Professional Responsibility finds that the CPEO program office erred, the CPEO's suspension will lift.⁷⁶ Alternatively, if the IRS Office of Professional Responsibility finds that the CPEO program office did not abuse its discretion, the CPEO's certification will be revoked.⁷⁷

D. Consequences of CPEO Suspension

A CPEO facing suspension is subject to several consequences. First, the IRS will publicly disclose the CPEO's suspension.⁷⁸ Second, the suspended CPEO must notify its clients in writing of its suspension within ten days of the suspension's effective date.⁷⁹ The IRS may also issue notice to the suspended CPEO's clients.⁸⁰ Third, if the suspended

70. *Id.*

71. *Id.*

72. *Id.* (noting further that the IRS will not consider arguments as to the ultimate question of whether there exists a material risk to the IRS's collection of federal employment taxes).

73. *Id.* at 434-35.

74. Rev. Proc. 2017-14, 2017-3 I.R.B. 434-35.

75. *Id.* at 435.

76. *Id.*

77. *Id.*; *see id.* (explaining the contents of the notice of final revocation).

78. Treas. Reg. § 301.7705-2(n)(4)(ii) (2019).

79. *Id.* § 301.7705-2(n)(4)(i); Rev. Proc. 2017-14, 2017-3 I.R.B. 434.

80. Treas. Reg. § 301.7705-2(n)(4)(ii) (2019).

CPEO enters into a new service contract under section 7705(e)(2), section 3511 will not apply to that service contract.⁸¹

E. Consequences of CPEO Revocation

A CPEO whose certification is revoked also faces consequences. First, the IRS will disclose the revocation on its public listing.⁸² Second, the CPEO whose certification is revoked must notify its clients of the revocation.⁸³ The IRS may also notify the CPEO's clients.⁸⁴ Third, if the CPEO whose certification is revoked wishes to pursue certification again, it must wait one year after its revocation's effective date to reapply.⁸⁵ Fourth, and most importantly, section 3511 no longer applies as of the effective date of revocation.⁸⁶

F. Voluntary Termination of Certification

While not discussed in either section 3511 or section 7705, it is possible that a CPEO could elect to terminate its certification voluntarily. Though not explored in the statutes, this is a scenario envisioned by Revenue Procedure 2017-14, which provides a process by which a CPEO may terminate its certification voluntarily and discusses the implications of that decision.⁸⁷

In terms of the process, a CPEO voluntarily terminates its certification by submitting written notice to the IRS.⁸⁸ The CPEO must submit this notice at least thirty days prior to the proposed date on which the voluntary termination would go into effect.⁸⁹ The notice must include a sample of the notification that the CPEO provided to its customers.⁹⁰ The customer notification must be in writing, must advise the CPEO's customers that the CPEO intends to terminate its certification, must set forth the date on which the CPEO proposes that termination to be effective, and must explain the employment tax

81. *Id.* § 301.7705-2(n)(2).

82. *Id.* § 301.7705-2(n)(4)(ii).

83. *Id.* § 301.7705-2(n)(4)(i); Rev. Proc. 2017-14, 2017-3 I.R.B. 435 (explaining that the client notification issued by the CPEO must contain notice that "the CPEO's certification has been revoked, that the provisions of section 3511 of the Code no longer apply to the customer's relationship with the CPEO, and that the customers may also be liable (as of the effective date of revocation) for federal employment taxes imposed on remuneration remitted by the CPEO to all employees covered by the customer's contract with the CPEO.").

84. Treas. Reg. § 301.7705-2(n)(4)(ii) (2019).

85. *Id.* § 301.7705-2(n)(3).

86. Rev. Proc. 2017-14, 2017-3 I.R.B. 435.

87. *Id.* at 435-36.

88. *Id.* at 435.

89. *Id.*

90. *Id.*

consequences of the decision.⁹¹ Revenue Procedure 2017-14 requires that the CPEO include “a statement that the customer may also be liable (as of the effective date of termination) for federal employment taxes imposed on remuneration remitted by the CPEO to all employees covered by the customer’s contract with the CPEO.”⁹² In addition to the notice sent to CPEO customers by the CPEO, the IRS may also notify the CPEO’s customers of the CPEO’s intent to voluntarily terminate its certification.⁹³ In terms of timing, a voluntary termination can occur at any time except during a suspension imposed by the IRS.⁹⁴ However, the effective date of voluntary termination must be the first day of a calendar quarter.⁹⁵

The key implication of voluntary termination is that the CPEO is no longer IRS-certified; thus, the provisions of section 3511 no longer apply.⁹⁶ Also, the IRS will remove the CPEO’s name from the list of CPEOs on its website.⁹⁷ Of interest is that section 7705(f) requires public listings of CPEOs, suspended CPEOs, and revoked CPEOs; however, that same provision does not require public disclosure of CPEOs whose certifications have been voluntarily terminated.⁹⁸ Thus, the only way to track CPEOs who have voluntarily terminated their certification is to manually compare the most recently published listing of CPEOs with previously published CPEO listings. As the historic listings are not publicly available on the IRS website, obtaining this information can prove quite difficult.⁹⁹ CPEO legislation gives little attention to voluntary termination of CPEO status. However, voluntary terminations warrant a closer look, as the rates of voluntary termination can provide some insight into how a PEO perceives the value added by certified PEO status. It is also worthy of attention because even though current PEO clients must be notified of the decision to voluntarily terminate certification, there is no easily accessible way for future clients of that particular PEO to know of that choice.

91. *Id.*

92. Rev. Proc. 2017-14, 2017-3 I.R.B. 435.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 435-36.

97. *Id.*

98. I.R.C. § 7705(f).

99. See *CPEO Public Listings*, *supra* note 17.

III. DATA FROM THE CPEO PUBLIC LISTINGS

A. Statutory Requirements for CPEO Public Listings

The CPEO public listings on the IRS website provide a public portal into the CPEO program. Thus, before analyzing the data from the CPEO public listings, it is helpful to understand the public listings' organization and purpose. Pursuant to section 7705, the Secretary must make the names and addresses of certified PEOs publicly available.¹⁰⁰ Likewise, section 7705 provides that the name of any PEO whose certification is suspended or revoked must be publicly available, as well.¹⁰¹ Hence, the CPEO public listings are accessible via spreadsheets published to the IRS website under the heading "CPEO Public Listings."¹⁰² The website provides for quarterly updates of the public listings.¹⁰³ In terms of public disclosure, the statute, regulations, and Revenue Procedure 2017-14 envision four scenarios that would prompt an update to the public listings: (1) certification; (2) suspension; (3) revocation; and (4) voluntary termination.

Upon certification, section 7705 provides that the Secretary will make public disclosure of the CPEO's name and address.¹⁰⁴ The regulations add that the public disclosure will also include the effective date of certification.¹⁰⁵ Upon suspension, the IRS will remove the name of the PEO from the list of CPEOs and relocate it to the list of suspended CPEOs.¹⁰⁶ If the IRS lifts the suspension, the IRS will remove the CPEO's name from the list of suspended CPEOs in accordance with the following timeline: "as soon as practicable, but no later than the next update of the list that occurs after the suspension is lifted."¹⁰⁷ Upon revocation, the IRS will transfer the name of the CPEO to its listing of revoked CPEOs.¹⁰⁸ This transfer will happen as soon as practicable; however, it will occur no later than the next quarterly update of the public listings.¹⁰⁹ Upon voluntary termination, the IRS will remove the CPEO from its public listing altogether, however, the IRS website does not list CPEOs who have voluntarily terminated their certification.¹¹⁰

100. I.R.C. § 7705(f).

101. *Id.*

102. *CPEO Public Listings*, *supra* note 17.

103. *Id.*

104. I.R.C. § 7705(f).

105. Treas. Reg. § 301.7705-2(a)(3) (2019).

106. *Id.*

107. Rev. Proc. 2017-14, 2017-3 I.R.B. 434-35.

108. *Id.* at 435.

109. *Id.*

110. *Id.* at 435-36; *see CPEO Public Listings*, *supra* note 17.

B. Data from the CPEO Public Listings

The CPEO public listings provide rich ground from which to understand the scope of the CPEO program and from which to mine opportunities to improve the program. At the time of this article, the IRS added to its website its most recent update to the CPEO public listings on February 22, 2023.¹¹¹ The most recent updates to the public listing of suspended CPEOs and revoked CPEOs occurred on February 22, 2023 and January 3, 2023, respectively.¹¹² This section analyzes the data contained in this most recent update of the CPEO Public Listings as a snapshot by which to contextualize the recommendations for increased information sharing and transparency.

It is helpful, at the outset, to have a sense of the overall size of the CPEO program. In the most recent iteration of the public listing, there are 133 listed CPEOs currently certified by the IRS.¹¹³ It is important to note that many of the listed CPEOs can be considered related entities, which can be categorized by the CPEO having a common ownership structure (i.e., one CPEO is a subsidiary of another, or the CPEO has the actual same physical address as another CPEO on the list). Turning to revoked CPEOs, the published spreadsheet containing data on revoked CPEOs reveals that the IRS has currently revoked the certification of eight CPEOs.¹¹⁴ However, a closer look into the public listing reveals that five of the eight CPEOs listed on the spreadsheet are actually related.¹¹⁵ Thus, a fairer statement would be that the most recent public listing shows that, at present, the IRS has revoked the certification of four unique CPEOs. At present, two CPEOs are suspended.¹¹⁶

This section takes a deeper dive into the CPEOs whose certifications are currently revoked. Further analysis can help identify the availability of any policy and legislative solutions to improve the CPEO program's suspension and revocation process.

1. Illustration: The Revocation of Five Related CPEOs

The CPEO program's revocation procedures faced real-world application when the IRS revoked the certification of five related CPEOs effective November 18, 2019.¹¹⁷ The IRS publicly disclosed the

111. *List of CPEOs*, *supra* note 13.

112. *List of Suspended CPEOs*, IRS, <https://www.irs.gov/pub/irs-utl/suspended-cpeos.pdf> (Feb. 22, 2023); *List of Revoked CPEOs*, *supra* note 16.

113. *List of CPEOs*, *supra* note 13.

114. *List of Revoked CPEOs*, *supra* note 16.

115. *See id.*

116. *List of Suspended CPEOs*, *supra* note 112.

117. *See id.*

revocation via the CPEO public listings on its website.¹¹⁸ While the IRS provided publicly the name and address of each separate entity as required by section 7705(f), the public listings do not include any additional information on the reason for the revocation.¹¹⁹

Because of the scant detail provided publicly by the IRS, some additional context can prove helpful. Further analysis reveals that all five of these individually-listed PEOs had achieved certification effective January 1, 2017, the earliest date for certification under the CPEO program.¹²⁰ Furthermore, as additional context, this PEO group is currently a member of the National Association of Professional Employer Organizations (“NAPEO”) and has been for over two decades.¹²¹ Importantly, this PEO group is currently accredited by the Employer Services Assurance Corporation (“ESAC”) and has maintained accreditation by ESAC since December 31, 2014.¹²² ESAC is the PEO industry’s official accreditation organization.¹²³ In support of its accreditation program, ESAC notes that no accredited PEO has ever defaulted.¹²⁴ As further support, many states view ESAC accreditation as a substitute for state licensing requirements.¹²⁵ Finally, to put ESAC accreditation into context, less than five percent of PEOs have pursued and received ESAC accreditation.¹²⁶ This juxtaposition of early adoption of CPEO certification and maintenance of ESAC accreditation with loss of CPEO certification appears incongruent. If the CPEO program is designed, at least in part, to provide safeguards for small businesses, the most obvious safeguard in this context would be to provide transparency by disclosing publicly via the CPEO public listings the reason behind the revocation.

It should also be noted that, based on the effective date of the revocation, these PEOs could pursue certification again, if they wished, as more than one year has passed since the revocation’s effective

118. *Id.*

119. *Id.*

120. *See List of CPEOs*, IRS (July 7, 2018) (on file with the author).

121. *Find a PEO*, NAPEO, <https://www.napeo.org/what-is-a-peo/selecting-a-peo/find-a-peo> (last visited Jan. 27, 2022); Bruce Katz, *What a PEO Can Do For You*, 188 J. OF ACCT. 57, 61 (1999) (recommending a selection of PEO with a NAPEO membership as a marker that the “PEO adheres to the industry’s highest standards for quality of service and professional integrity”).

122. *AccessPoint*, ESAC, <https://www.peoreliability.org/AccessPoint?S=T> (last visited Jan. 10, 2022).

123. *About ESAC*, ESAC, <https://www.peoreliability.org/about-esac> (last visited Jan. 10, 2022).

124. *Id.*

125. *PEOs*, ESAC, <https://www.esac.org/peo/> (last visited June 2, 2021).

126. *About ESAC*, *supra* note 124.

date.¹²⁷ Interested parties should continue to monitor whether these related PEOs choose to do so.

2. Illustration: A PEO's Delayed Financial Audit Review Triggers Revocation

The current CPEO public listings show that the CPEO program's revocation procedures were also tested when the IRS revoked the certification of an additional CPEO effective April 1, 2020.¹²⁸ That CPEO originally obtained certification on January 1, 2017, which, as discussed earlier, was the first possible date to become certified.¹²⁹ In addition to its status as a first mover in the CPEO program, this PEO has maintained NAPEO membership since 1996, indicating a long and stable presence in the overall relatively young PEO industry.¹³⁰

While the IRS did not disclose the reason for the revocation via the CPEO public listings, the PEO did make its letter to its clients regarding the revocation (and an earlier letter regarding suspension) publicly available on its website.¹³¹ As described in those letters, the revocation process started with the IRS issuing a notice of suspension to the CPEO effective November 15, 2019.¹³² A delay in the CPEO's financial audit review triggered the suspension.¹³³ On February 24, 2020, the CPEO followed-up with a second notification to its clients that the IRS planned to revoke its certification effective April 1, 2020.¹³⁴ As in the 2019 letter, that follow-up letter cited a delay in the review of the company's financial audit as the cause of the revocation.¹³⁵ As more than one year has passed since the revocation's effective date, this CPEO is now eligible to pursue certification again, should it choose to do so.¹³⁶

127. See Treas. Reg. § 301.7705-2(n)(3) (2019).

128. See *List of Revoked CPEOs*, *supra* note 16.

129. See *List of CPEOs*, *supra* note 121; see also *CPEO Public Listings*, *supra* note 17. Interestingly, a related entity of this PEO also achieved certification effective January 1, 2017. See *List of CPEOs*, *supra* note 121.

130. *Find a PEO*, *supra* note 119.

131. Letter from Andrew Lindley, COO, Avitus Grp., to Avitus Group Clients (Nov. 25, 2019) [hereinafter 2019 Avitus Grp. Letter], <https://avitusgroup.com/wp-content/uploads/2019/11/Avitus-CPEO-Letter-11-22-19.pdf>.

132. *Id.*

133. *Id.*

134. Letter from Andrew Lindley, COO, Avitus Grp., to Avitus Group Clients (Feb. 24, 2020), <https://avitusgroup.com/wp-content/uploads/2020/02/Avitus-CPEO-Letter-2-24-20-v1.pdf>.

135. *Id.*

136. See *List of Revoked CPEOs*, *supra* note 16.

3. Illustration: An Additional Test of the IRS's Revocation Procedures

The current CPEO public listings reveal that an additional test of the CPEO program's revocation procedures took place several months later when the IRS revoked the certification of an additional CPEO effective August 12, 2020.¹³⁷ That CPEO originally obtained certification on January 1, 2019.¹³⁸ Pursuant to statutory requirements, the public listings include the name and address of the PEO; however, the public listings do not include any information on the reason for the revocation.¹³⁹

As evidenced in the discussion of other revoked CPEOs, the information provided publicly by the IRS is barebones, at best. However, to provide additional context, this PEO has been a NAPEO member since 2012 and is accredited by ESAC.¹⁴⁰ Just as discussed in the context of the first illustration, this third illustration also juxtaposes federal regulation of PEOs with private regulation of PEOs by an industry organization (ESAC) and highlights a tension in the regulatory regime. It should be noted that, based on the effective date of the revocation, this PEO could have pursued certification again starting in August 2021.¹⁴¹

While this PEO remains on the list of PEOs whose certification is revoked, it is noteworthy that a PEO with the exact same name and similar address is currently included in the current CPEO listings.¹⁴² The effective date of certification for that PEO is April 1, 2022.¹⁴³ This highlights an opportunity for the IRS to provide clarity, as the small business owner who visits the CPEO Public Listings website should be able to decipher easily the certification status of its PEO.

4. The Most Recent Test of the Revocation Procedures

The current CPEO public listings reveal that the IRS revoked the certification of an additional CPEO effective January 1, 2023.¹⁴⁴ That CPEO first obtained certification on July 1, 2020.¹⁴⁵ That CPEO has

137. *Id.*

138. *List of CPEOs*, IRS (July 12, 2019) (on file with author).

139. *See List of Revoked CPEOs*, *supra* note 16.

140. *Find a PEO*, *supra* note 119.

141. *See* Treas. Reg. § 301.7705-2(n)(3) (2019); *see also supra* note 137 and accompanying text.

142. *List of CPEOs*, *supra* note 13 (noting that Lever1, LLC is a CPEO). The address is listed as 450 E. 4th Street Kansas City, Missouri. *Id.* The current listing of revoked CPEOs lists Lever1, LLC with an address of 510 West 5th Street Kansas City, Missouri. *List of Revoked CPEOs*, *supra* note 16.

143. *List of CPEOs*, *supra* note 13.

144. *Id.*

145. *List of CPEOs*, *supra* note 139.

maintained NAPEO membership since 1996.¹⁴⁶ In addition, that CPEO is accredited by ESAC and has held that accreditation since December 27, 2000.¹⁴⁷

5. Illustration: An Earlier Test of the CPEO Program's Suspension Procedures

At present, no CPEO is currently under suspension. However, just as the CPEO program's revocation procedures have faced several tests, it would be remiss to fail to mention that the CPEO program's suspension procedures have been tested, as well. One challenge in tracking suspension data is that the IRS's timeline for updating the CPEO public listings to reflect the suspension list is described as being "as soon as practicable, but no later than the next update of the list that occurs after the suspension is lifted."¹⁴⁸ Because of this language contained in the Revenue Procedure, it is possible, if unlikely, that the IRS could implement a suspension and lift a suspension between its quarterly updates of the CPEO public listings.

Despite the CPEO public listing's limitations in tracking suspension data, it is still helpful to consider an example of a CPEO that faced suspension but avoided revocation. In November 2019, the IRS suspended a CPEO for "inadvertent administrative errors related to certain federal employment tax filings. For example, some of those filings were made through traditional paper filings rather than electronically in accordance with the CPEO requirements."¹⁴⁹ Thus, this description seems to explain that the CPEO provided all necessary documents but did not provide the information in the format specified by the CPEO program requirements.

As context, that CPEO had achieved certification on January 1, 2017 (the first possible date), is a NAPEO member, and is accredited by ESAC.¹⁵⁰ On September 30, 2020, almost a year later, the IRS lifted the CPEO's suspension.¹⁵¹ Since then, that CPEO has remained IRS-certified and is currently included in the CPEO public listings on the IRS's website.¹⁵²

146. *Find a PEO*, *supra* note 122.

147. *Altres*, ESAC, <https://www.peoreliability.org/ALTRES?S=T> (last visited Feb. 22, 2023).

148. Rev. Proc. 2017-14, 2017-3 I.R.B. 434-35.

149. Email from Isaac Oates, CEO, Justworks, to All Justworks Customers (Oct. 5, 2020) [hereinafter 2020 Justworks Email], <https://justworks.com/cpeo-facts>.

150. *See Find a PEO*, *supra* note 122 (select "Delaware" and search "Justworks"); *see also List of CPEOs*, *supra* note 13.

151. 2020 Justworks Email, *supra* note 150.

152. *List of CPEOs*, *supra* note 13.

6. Analysis of CPEO Revocation Data

As an initial caveat, there are only eight CPEOs included on the current public listing of revoked CPEOs; thus, it is important to note that this small data set presents some difficulty in identifying any overall themes. That being said, this snapshot from the public listings of revoked CPEOs clearly shows that the revocation rate for CPEOs is quite low. This is a promising sign that the CPEO program is providing the protection that it set out to provide.

Considering all of the revoked CPEOs as a whole, however, some consistent elements become clear. First, all of the revoked CPEOs are members of NAPEO, the PEO industry's trade organization.¹⁵³ Further, all have been NAPEO members for at least nine years.¹⁵⁴ Second, all but one of the revoked CPEOs are currently accredited by ESAC.¹⁵⁵ When less than five percent of PEOs achieve ESAC accreditation, that fact deserves highlighting.¹⁵⁶ Third, all of the revoked CPEOs are currently providing PEO services.¹⁵⁷

IV. IMPLICATIONS AND OPPORTUNITIES

Now that the CPEO program has certified PEOs for six years, its revocation and suspension process has faced several tests. As those procedures have been road-tested, an opportunity exists to examine whether the process could be improved. The most recent 2023 listing of revoked CPEOs reveals that four unique PEOs currently have their certification revoked.¹⁵⁸ This would seem to demonstrate that the CPEO program is achieving its underlying goal of protecting small businesses by both attracting to the certification program PEOs who can meet its

153. *Compare List of Revoked CPEOs*, *supra* note 16, with *Find a PEO Search*, NAPEO, <https://www.napeo.org/what-is-a-peo/selecting-a-peo/find-a-peo> (search in search bar for the firms listed in the IRS' *List of Revoked CPEOs*).

154. *Compare List of CPEOs*, *supra* note 13, with *Find a PEO Search*, NAPEO, <https://www.napeo.org/what-is-a-peo/selecting-a-peo/find-a-peo>, *supra* note 143 (using the Find a PEO search tool also provides membership dates).

155. *Compare List of Revoked CPEOs*, *supra* note 16, with *Verify Accreditation Status Search Tool*, ESAC, <https://www.peoreliability.org/find> (last visited Feb. 18, 2023) (search in search bar for the firms listed in the IRS' *List of Revoked CPEOs*) (only one company was not accredited by ESAC as of 2023).

156. *About ESAC*, *supra* note 124.

157. *See AccessPoint*, ACCESSPOINT, <https://apteam.com> ("...AccessPoint's PEO solutions free up your time to grow your time to grow your business."); *FAQs*, AVITUS GRP., <https://avitusgroup.com/about-avitus/faqs/> ("Avitus Group was founded in 1996. We determined from day one we would not be just another Professional Employer Organization; we wanted to up the ante and provide service unlike companies had ever seen before."); *About*, LEVER1, <https://lever1.com/about/> ("Lever1 is a Kansas City-based professional employer organization (PEO)...").

158. *List of Revoked CPEOs*, *supra* note 16.

stringent requirements and by actively policing PEOs who may subsequently fail to meet the program's requirements. However, it does present some concern that some of the CPEOs whose certifications are currently revoked are also currently accredited by ESAC, which seems contradictory.¹⁵⁹ Likewise, it seems incongruent that the CPEOs whose certifications were revoked are long-standing industry members who are also NAPEO members.¹⁶⁰ Perhaps the natural inclination is to place more credence on the value of federal regulation (here, the IRS CPEO program) instead of the private regulatory regime (here, ESAC) under an assumption that the private regulator could be more self-serving for the industry; however, this assumption is unfair and demonstrates the necessity of increased transparency. The illustration provided of the suspended PEO, who explained that the suspension was caused by "inadvertent administrative errors,"¹⁶¹ and of the revoked PEO who explained that the suspension and subsequent revocation was due to a delay in a financial audit review¹⁶² hardly seem to meet the high standard of posing a material risk to the collection of employment taxes. Thus, instead of merely adopting an assumption that the private regime is self-serving, the examples suggest that the more appropriate query is whether tweaks to the CPEO program regulations are needed to avoid administrative hiccups. It is important to continue to monitor that the CPEO program requirements remain stringent so as to protect small businesses; however, it is also important that this stringency is balanced by necessity so that CPEOs are not weeded out of the CPEO program for reasons that could be merely administrative.

In addition, another opportunity for improvement exists via mandating inclusion of additional information in the public listings. The CPEO public listings provide a window through which to view the revocation and suspension process and function as a valuable tool for the public, including potential PEO customers. One major opportunity for improvement of the public listings is to utilize them to make the CPEO revocation and suspension process more transparent. If the legislation's goal is to protect small businesses, then one method of doing that is by providing those small businesses with as much information as possible by which to make their decision as to which PEO to select. As the CPEO public listings provide the public portal into the CPEO program, then select improvements to that portal are needed. Fortunately, these updated requirements would cost little and utilize information that is already available.

159. See *supra* note 156 and accompanying text.

160. See *supra* notes 154–55 and accompanying text.

161. 2020 Justworks Email, *supra* note 150.

162. 2019 Avitus Grp. Letter, *supra* note 132.

One proposed update to the public listings would include a coding of the reason(s) for the CPEO's suspension or revocation. While section 7705(f) only requires public disclosure of the name and address of the suspended or revoked CPEO,¹⁶³ disclosing the reason(s) behind the suspension or revocation could be extremely helpful to potential customers of the PEO. Of course, the standard for revocation and suspension is whether there exists "a material risk to the IRS's collection of federal employment taxes"¹⁶⁴ and, certainly, any suspension or revocation of CPEO status should be taken seriously by current and potential clients. However, an inclusion in the public listing of the reason, especially for the suspension of a CPEO, could help the potential client of the CPEO assess whether there may be an opportunity to cure the concern (e.g., the possibility of curing a delayed audit versus the possibility of curing a fraud conviction with no additional appeals). This information is available because the reason behind the suspension must be cited in the IRS's notice of suspension and proposed revocation that it provides to the PEO.¹⁶⁵ If the CPEO requests review, the notice of final revocation must also explain the reason for revocation.¹⁶⁶ Thus, as the information is available, it could be added easily to the website with minimal cost. In the United States, there are 487 PEOs¹⁶⁷ between which a potential PEO client could choose. If the goal of the legislation is to help small businesses, then requiring the IRS to code the reason for a particular PEO's suspension or revocation would serve that end by allowing potential PEO clients to make more informed choices.

A second proposed update to the public listings would be to include on the IRS website a listing of CPEOs who have elected to terminate their certification voluntarily.¹⁶⁸ As discussed earlier, the public listings are required by statute to include CPEOs, suspended CPEOs, and revoked CPEOs; however, the website is not required by statute to include a listing of CPEOs who have elected to terminate their certification voluntarily.¹⁶⁹ While this certainly complies with the current requirements of section 7705(f), a public listing of CPEOs who have voluntarily terminated their certification could be a useful addition to the other public listings and should be required. Even though Revenue Procedure 2017-14 requires that the CPEO notify its current customers of its intent to terminate voluntarily its certification, prospective

163. I.R.C. § 7705(f).

164. Treas. Reg. § 301.7705-2(b) (2019).

165. Rev. Proc. 2017-14, 2017-3 I.R.B. 434.

166. *Id.* at 435.

167. *Industry Statistics*, NAPEO, <https://www.napeo.org/what-is-a-peo/about-the-peo-industry/industry-statistics> (last visited Feb. 18, 2023).

168. I.R.C. § 7705(f) (providing the current public listing requirements for CPEOs).

169. *Id.*

customers would not necessarily know of that decision and the reasons prompting it.¹⁷⁰ An improvement to the CPEO program would be to include information regarding voluntary termination in the public listings so that future customers are aware and also have an opportunity to ask any questions that they may have about the PEO's decision to terminate certification.

One data point to continue to monitor from the public listings is the number of CPEOs choosing to voluntarily terminate their certification. The impetus for the PEOs' decision could likely reveal opportunities to improve further the overall CPEO program. In addition, interviewing PEOs who elected to terminate their certification voluntarily could provide a fruitful avenue for future research. Another suggestion is for interested parties to continue to monitor the public listings to see if revoked CPEOs choose to pursue certification again after the one year wait period. Depending on the reason that the IRS revoked the PEO's certification, the PEO's decision as to whether to pursue certification a second time could provide some insight into the value that the PEO (or its clients) placed on its status as a CPEO.

V. CONCLUSION

An assessment of the CPEO program's revocation procedures is important from the perspective of the IRS, the CPEO, and the CPEO client. From the CPEO's perspective, suspension or revocation of CPEO status has the potential for a sharp reputational impact. Thus, it is important that the suspension and revocation procedures are fair, transparent, and offer the opportunity for review. From the CPEO client's perspective, suspension or revocation of their CPEO's certification removes the employment tax liability shifting set out in the legislation; thus, upon suspension or revocation the client company becomes liable potentially for any employment taxes rendered to the PEO that are not subsequently paid to the IRS by the PEO. As such, the client company would also want a fair suspension and revocation process. Of course, from the IRS's perspective, the agency is tasked with upholding the stringent standards set out in the regulations and it needs a fair and efficient enforcement mechanism. Therefore, from the perspective of all stakeholders, it is important that the revocation process should function as well on the back end as the initial certification processes should function on the front end. One way to improve the revocation process is to increase transparency beyond that required by the current statutes and regulations. This would benefit all

170. Rev. Proc. 2017-14, 2017-3 I.R.B. 435.

stakeholders and ultimately protect the small businesses that this legislation was designed to safeguard.