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Tax Amnesty: An Old Debate as Viewed From Current Public Choices

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I. INTRODUCTION

The Clinton administration arrived with specific, well-advertised goals: job creation, a comprehensive national health care program, economic recovery and a commitment to reduce the constantly increasing federal deficit.¹ There is no question that President Clinton has established these policy objectives as the primary criteria upon which he desires his forthcoming leadership efforts to be judged by the electorate. Success on these domestic issues would enhance his position for re-election in 1996, and would merit well-deserved respect for leadership and judgment. Whether all of these separate but related goals can be achieved within both the short and long term, without being counter-productive to each other, presents one of the more intriguing enigmas faced by the administration.

Job creation and a comprehensive national health care program will necessarily consume more revenue in the short term. Consequently, the federal deficit will increase unless new resources are found to pay the costs of these programs and unless acquisition of such resources does not significantly impair the economic recovery in progress. Indeed, the current economic recovery can, on its own, deliver significant dividends. Nevertheless, the search for resources will be one of the more consuming and politically sensitive issues facing President Clinton. The new resources may be generated by any of the following items: (1) a cut in government expenditures, including mandatory programs; (2) an economic dividend generated

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1. See President William J. Clinton, Inaugural Address (Jan. 20, 1993), in 29 *Wkly. Compilation of Presidential Documents*, 75-77 (Jan. 25, 1993).

through restructuring of the health delivery system;² and (3) an increase in tax revenues.³ Notwithstanding the anticipated economic dividend to be generated from the restructuring of a health delivery system, it is likely that only cuts in federal expenditures coupled with increased tax revenues will provide the funds necessary to attain and sustain President Clinton's goals as laid out in his State of the Union Address.

The normal political jousting conducted during the presidential campaign—i.e., do the numbers add up—is now irrelevant to the more pressing search for new resources in light of the recently revised report of the Office of Management and Budget (the "OMB") that the deficits for fiscal year 1994 and the out years are greater than the original estimates of the Bush Administration.⁴ Apart from the debate as to whether the increase in the

2. President William J. Clinton, Remarks on Health Care Reform and an Exchange With Reporters (Jan. 25, 1993), in 29 *Wkly. Compilation of Presidential Documents*, 96-98 (Feb. 1, 1993). President Clinton has consistently expressed the view that universal health insurance can be provided without incurring increased costs. In responding to a question of whether universal health coverage will increase deficits, President Clinton stated, in part, the following:

So the answer to your question is, in my judgment, if we do this right over the next 8 years, you're going to see huge savings in tax dollars and even bigger savings, more than twice the savings, in private dollars that will free up hundreds of billions of dollars literally between now and the end of the decade to reinvest in economic growth and opportunity.

In the short run, our tough call will be how do you take savings and phase in universal coverage. Or should there be some other way to pay for that? We've got some short-term calls to make. But there's no question that in the median term, 5 to 8 years, you're looking at massive savings with universal coverage in both tax dollars and private sector dollars if we do it right.

Id. at 97-98. Obviously, President Clinton is aware that, during the short term, universal health care will impose very substantial increases in costs if such health protection is provided.

A memorandum on health care costs, written by White House advisor Ira Magaziner to health care task force leader Hillary Rodham Clinton, estimated that the annual additional cost for universal health care coverage might run between \$30 billion and \$90 billion a year by 1997. See Priscilla Painton, *The Next Dose of Medicine*, *Time*, Mar. 1, 1993, at 28. This highly confidential memorandum was leaked to the *Wall Street Journal*. *Id.*

3. See President William J. Clinton, *State of the Union Address* (Feb. 17, 1993), in *N.Y. Times*, Feb. 18, 1993, at A20; see also discussion *infra text* accompanying notes 8-9. Recently, President Clinton personally acknowledged that universal health care coverage would generate the need for more revenues and discussed the possibility of increased federal taxes on tobacco as a means of meeting some of these revenue demands. See Michael K. Frisby, *Clinton Signals New Tax on Cigarettes, Other Items to Finance Health Program*, *Wall St. J.*, Feb. 26, 1993, at A3. Thus, the basic choice is between cutting federal expenditures or raising taxes; as between those options, raising taxes may be the easier political choice.

4. Office of Management and Budget, *Budget Baselines, Historical Data, and Alternatives for the Future* 32-37 (January, 1993). See also Office of Management and Budget,

estimate of deficits was a true "surprise,"⁵ the expectation of greatly increased deficits approaching \$50 billion a year, over and above the previously projected figures for the out years, has been accepted as reasonably accurate for present planning purposes by both the administration and Congress. Thus, federal deficits, both accumulated and recently revised, have greatly reduced the administration's discretionary choices with respect to the design of programs necessary to attain its policy objectives. This is particularly true as rhetoric gave way to the birth of specific Clinton prescriptions, set forth in his State of the Union Address, and their anticipated enactment, with or without congressional modifications. Because of the opportunity for

Budget of the United States Government, Fiscal Year 1994 2 (1993) [hereinafter 1994 Budget]. There is a complicated political struggle behind the increased deficits projected in the recent budget of the Bush administration. The original budget projections for fiscal years ending 1993 through 1997, inclusive, reflected projected deficits for the respective fiscal years (independent of a national health care) of \$351 billion (1993), \$211.4 billion (1994), \$192.1 billion (1995), \$180 billion (1996) and \$181.8 billion (1997). The final report of the Bush administration, as prepared by the Office of Management and Budget ("OMB"), dated January 6, 1993, revealed projected deficits for 1994 and the out years significantly greater than original estimates made on January 29, 1992. *Id.* Prior estimates made by the Congressional Budget Office ("CBO"), released during August of 1992, projected deficits for the years 1993 through 1997 of \$331 billion (1993), \$268 billion (1994), \$244 billion (1995), \$254 billion (1996) and \$290 billion (1997). Congressional Budget Office, *The Economic and Budget Outlook: An Update* xii (Aug. 1992) [hereinafter *Budget Outlook*]. These estimated losses were substantially greater than the original projections of the OMB and are confirmed in the Budget of the United States for FY 1994. 1994 Budget, *supra*.

The CBO explained in its Budget Outlook that the 1990 budget agreement failed to reach its goal of control over the deficits because: "a stubbornly sluggish economy, a shortfall in tax revenues, and unexpectedly rapid growth in federal benefit programs—primarily Medicare and Medicaid—have left the federal deficit stuck near \$300 billion for the next few years and heading upward in the second half of the decade." *Budget Outlook, supra*. Because of the significant increases in the deficit projections by the CBO, Senator Pete V. Domenici (R-N.M.) expressed the view that the Clinton administration was somewhat disingenuous in its claimed "shock" regarding notice of the revised deficit projections of the OMB released on January 6, 1993. Pete V. Domenici, *The GOP's Offer*, *Wash. Post*, Feb. 21, 1993, at C7. Yet, President Clinton's team said "our legs were taken out from under us when the new OMB numbers came out." Dan Balz & Ann Devroy, *How Clinton Navigated Politics, Economics on Plan*, *Wash. Post*, Feb 21, 1993, at A1, A16.

The normally confrontational Richard Darman, former Director of the OMB, went out of his way not only to point out that candidate Clinton's economic blueprint "creates a circle that cannot be squared..." but also assumed that discretionary spending will be frozen for the years 1996, 1997 and 1998, after the caps established under the 1990 Budget Summit expire. George Hager, *Time Bombs for Clinton Seen in Bush's Final Budget*, 51 *Cong. Q.* 68, 71 (Jan. 9, 1993). The completely unrealistic assumption of a freeze in discretionary spending for the out years after fiscal year 1995, and the resulting increase in the projected deficits, broke the back of the promised middle class tax relief.

5. Balz & Devroy, *supra* note 4, at A16.

political manipulation of OMB projections, President Clinton's goal of a \$140 billion cut in the projected deficits for 1997 will now be based upon the perhaps less politically sensitive budget projections of the Congressional Budget Office.⁶

The American electorate likely will support the President when he effects a significant change in his political policy—for example, by recommending increases in taxes without providing tax relief to the middle class—if the facts necessitating such change are candidly set forth. President Clinton's inaugural address highlighted the need for equal sharing of the sacrifice. The State of the Union Address filled in some painful details which illustrate the meaning of commitment to shared sacrifice. The President said that all Americans must share the burdens of government if more of us are to realize the promises of a right to liberty in its full empirical reality: a place to live, a quality education, a job, comprehensive health care and the full opportunity to realize our individual potential. The initial public response suggests that the body politic is willing to support the President's comprehensive economic and tax program.⁷

President Clinton has selected experienced policy advisers who will effectively represent his position as the comprehensive program moves through Congress. Secretary of the Treasury Lloyd Bentsen and OMB Director Leon Panetta, among others, provide an exceptional combination of experience,⁸ legislative expertise, and judgment to defend President Clinton's recommendations with respect to cuts in government expenditures and increases in taxes.

To fund his comprehensive economic plan, President Clinton recommended that Congress immediately enact a tax package containing the following elements:

1. An energy tax based on British thermal unit or heat content as well as a continuation of a federal gasoline tax.
2. An increase in the highest marginal rate to thirty-six percent on incomes in excess of \$140,000 for people filing a joint return and a surtax on taxable income in excess of \$250,000.
3. Disallowance of business expense deductions by corporations for compensation of a corporate officer or director in excess of \$1 million dollars, except where compensation is based upon productivity.

6. Clinton, *supra* note 3.

7. Nancy Gibbs, *Working the Crowd*, *Time*, Mar. 1, 1993, at 26. The initial public response to the economic and tax proposals was quite positive. The polls reflected very favorable support for the President's plan. *Id.*

8. See Balz & Devroy, *supra* note 4, at A16.

4. An increase in tax collected on the incomes of foreign businesses through enhanced enforcement of section 482 of the Internal Revenue Code or the enactment of amendments which may be necessary to tax foreign corporations on profits made in the United States.
5. An increase in the tax rate to thirty-six percent for corporations the taxable income of which exceeds \$10 million.
6. An increase in the percentage of social security benefits which are subject to the income tax from fifty percent to eighty-five percent for a single person whose income is in excess of \$25,000 and for couples whose income is in excess of \$32,000.
7. A reduction in the amount of deductible entertainment expenses from eighty percent to fifty percent and the elimination of any deduction for club dues.
8. An expansion of the earned income tax credit to cover more low income taxpayers.
9. The enactment of an investment tax credit (permanent for small business and temporary for large corporations).
10. The enactment of enterprise zones, under which numerous tax benefits would be available to businesses operating in such zones.⁹

It is the purpose of this article to suggest that there be incorporated in the tax package a comprehensive federal tax amnesty program to secure additional tax revenues *which will not otherwise be recovered by the government*. Although a federal tax amnesty program has often been discussed,¹⁰

9. Summary of Administration's Revenue Proposals, Released by Treasury Department Feb. 25, 1993, Daily Tax Rep., Special Supplement (BNA) (Feb. 26, 1993).

10. See Testimony Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990) (testimony of Sen. Alan J. Dixon) (available in Tax Notes, microfiche Database Doc. 90-5335 (July 30, 1990)); James P. Angelini, Federal Tax Amnesty: Some Policy Considerations, 36 Tax Notes 907 (Aug. 31, 1987); Robert M. Melia, Is the Pen Mightier Than the Audit?, 34 Tax Notes 1309 (Mar. 30, 1987) (discussing a state amnesty program); Carol Douglas, Is a Federal Tax Amnesty the Answer to Our Deficit Problems?, 30 Tax Notes 711 (Feb. 24, 1986); Richard E. Harris, Revenue Sans Taxes: Congress Shifts Attention to Federal Tax Amnesty, 30 Tax Notes 916 (Mar. 10, 1986); Leo P. Martinez, Federal Tax Amnesty: Crime and Punishment Revisited, 10 Va. Tax Rev. 535 (1991); Bonnie G. Ross, Federal Tax Amnesty: Reflecting on the States' Experiences, 40 Tax Law. 145, 149 n.24 (1986) (listing tax amnesty bills introduced in the 99th Congress); U.S. Budget: Talk of Tax Amnesty Sweeps Congress as Senate Panel Starts Work on FY 1987 Budget Plan, Daily Tax Report, (BNA) LL-2 (Mar. 5, 1986); Federal Tax Amnesty: Has Its Time Come?, U.S. News & World Rep. 16 (1986).

the Internal Revenue Service has consistently opposed the adoption of such a program. In light of the pressing need for more revenue and anticipated significant increases in federal expenditures to fund a comprehensive health program,¹¹ the matter of a tax amnesty program deserves a full review. If we are to reinvent the government as the President has proposed, we must be able to review prior policy conclusions to see whether they remain appropriate from the perspective of current conditions.¹²

The sections set forth below discuss (1) the "tax gap"; (2) the recently announced nonfiling program of the Internal Revenue Service; (3) the administrative enforcement options available to the Internal Revenue Service; (4) an overview of a comprehensive tax amnesty program; (5) the traditional response of the Internal Revenue Service to a proposed amnesty program; and (6) a proposed model for a comprehensive tax amnesty program.

II. THE TAX GAP AND TAXPAYER RATIONALIZATION

The loss of revenue from noncompliance presents one of the more vexing and frustrating matters faced by tax administrators. The most recent Internal Revenue Service estimate of income tax revenue loss due to noncompliance has grown to between \$110 and \$127 billion a year,¹³ an amount

There have been a number of bills introduced on the topic. See Douglas, *supra* (listing bills introduced concerning a federal tax amnesty program); see also, e.g., Testimony Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990) (testimony of Michael J. Graetz) (available in Tax Notes, microfiche Database Doc. 90-5337 (July 30, 1990)); Testimony Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990) (testimony of Fred T. Goldberg, Jr.) (available in Tax Notes, microfiche Database Doc. 90-5336 (July 30, 1990)); Proposals to Simplify and Streamline the Payment of Employment Taxes for Domestic Workers: Joint Hearing Before the Subcomm. on Social Security & Subcomm. on Human Resources of the House Comm. on Ways and Means, 103d Cong., 1st Sess. (1993) (containing a discussion of tax amnesty for the limited purpose of employment tax liability of household consumers in connection with employment of domestic servants).

11. See Clinton, *supra* note 2 at 97 (containing President Clinton's remarks regarding the tough choices necessary to control health care costs and provide health care for everyone).

12. See Clinton, *supra* note 3.

13. Testimony Before the Subcomm. on Treasury, Postal Service and General Government of the House Comm. on Appropriations, 103d Cong., 1st Sess. (1993) (testimony of Michael P. Dolan) (available in LEXIS, Fedtax Library, TNT File, elect. cite 93 TNT 26-49). The tax gap estimates are based on Service studies conducted in 1988 and 1990. *Id.* See Gibbs, *infra* note 16. Former Commissioner Fred T. Goldberg candidly stated that " 'We don't really know, folks,' about the size of the tax gap. 'It might be \$80 billion [a year], it might be \$200 billion. We do know its a very large number.' " Sean Ford & Marianne Evans, IRS

almost equal to President Clinton's goal of cutting the deficit in 1997 by \$140 billion.¹⁴ The revenue loss due to noncompliance is referred to as the "tax gap."¹⁵ The tax gap does not include losses due to noncompliance with respect to employment taxes, excise taxes, or illegal sources of income.¹⁶ Consequently, the actual revenue loss due to noncompliance each year certainly exceeds the President's deficit reduction goal.¹⁷ A consumption type of system or a national sales tax may reduce the effects of noncompliance, but would present many other problems.¹⁸

For the short term, the issue of tax compliance under the existing income tax system, as it relates to nonfilers, tax avoiders and evaders, is a matter of national urgency. The tax gap and the consequent annual loss of billions of dollars has been reviewed by the Internal Revenue Service and Congress, as well as independent experts. The most important question is not the amount of the revenue lost, or whether the percentage of compliance is decreasing, improving or remaining the same,¹⁹ *but rather how can the amount of the revenue loss be reduced.*

Admittedly Has Long Way to Go On Administration, Simplification, 49 Tax Notes 1272, 1273 (Dec. 17, 1990).

14. Clinton, *supra* note 3.

15. United States General Accounting Office, Briefing Report to the Chairman, Subcomm. on Oversight, House Comm. on Ways and Means, Tax Administration: IRS' Tax Gap Studies 4 (Mar. 1988) (available in Tax Notes, microfiche Database Doc. 88-3368 (Apr. 4, 1988)). The tax gap according to the definition of the GAO is "the difference between the amount of income taxes voluntarily paid by individuals and businesses and the amount of income taxes that are owed." *Id.* The methodology used in determining such estimates relies largely on data derived from in-depth audit examinations referred to as the Taxpayer Compliance Measurement Program ("TCMP"). See Dolan, *supra* note 13.

16. See Testimony Before the Senate Budget Comm., 100th Cong., 2d Sess. (1988) (testimony of Lawrence B. Gibbs) (available in Tax Notes, microfiche Database Doc. 88-3367 (Apr. 11, 1988)). The tax gap does not include taxes not paid on income derived from illegal activities. *Id.* The Service was expected to issue similar tax gap reports concerning non-compliance in the tax areas of employment tax, excise tax, and illegal sources of income. Staff of the House Comm. on Ways and Means, 101st. Cong., 2d Sess., Overview of the Federal Tax System 195 (Comm. Print 1990) [hereinafter Overview]. This, as yet, has not occurred.

17. Clinton, *supra* note 3.

18. Among the major problems attendant to the adoption of a VAT would be that, like a national sales tax, the VAT would be a regressive tax and present numerous collection problems. See Shift to Consumption Taxation is Desirable, Says Former CEA Member, Daily Tax Report, (BNA) G-2 (Jan. 26, 1993).

19. See F.R. Nagle, IRS Takes Aim at Practitioners Amid News That Some Are Nonfilers, 58 Tax Notes 833, 834 (Feb. 15, 1993). Acting Commissioner Dolan indicated the rate of compliance remains stable at 83%. *Id.* See also Susan B. Long & David Burnham, The Numbers Game: Changes in Tax Compliance During the Last 25 Years?, 46 Tax Notes 1177 (Mar. 5, 1990); Ross, *supra* note 10, at 146 (indicating the rate of compliance in 1965 was 94%).

A separate but important part of the milieu in which nonfilers, tax avoiders and evaders often interact is the broad social structure of the "underground economy." The underground economy is actively supported by many of our citizens *sub silentio*. Unfortunately, they frequently view the issue of noncompliance with a certain degree of "gleeful joy" that one of them is escaping payment of taxes, rather than recognizing such conduct as it truly is, theft from every taxpayer who pays his or her fair share. This phenomenon is analogous to the public's support for the continuing illegal escapades of John Dillinger in the 1930's. Ideally, of course, the obligation to pay taxes should be viewed as a compact among all citizens to pay for the variety of services produced by the government such as insuring our savings accounts, guaranteeing minimum social security benefits, providing for health care and economic assistance in the event of a disaster, as well as providing police and armed forces protection for our basic security.

The extent to which people voluntarily enter into this compact can be affected by their perceptions of how well the government fulfills its purpose. Some believe that the government too often assumes a life of its own, independent of its purpose. It sometimes adopts policies which may violate common sense standards, for example, "he had to destroy the village to save it;"²⁰ and it attempts, consciously or not, to accumulate more power while providing less service and attempting to avoid accountability. The basic institutional attitudes of some careerist members of the government are directed toward increasing their own job security at the cost of delivering services. For this reason, it is enormously difficult for an agency of the government to present a vision of renewal which necessarily divests some of its careerist members of their secured positions of power. This situation also occurs in private industry. Indeed, everyone exists in interacting economic and social structures, and adopts strategies for his or her own survival. Careerist members of the government and independent entrepreneurs are simply operating in different primary regimes within which they both seek security and economic freedom. Our natural antagonism toward government and its inability to deliver common sense services, when combined with a sociopathic insensitivity in the administration of the law, particularly tax laws, *enrages us!* Still, the inherent and institutional limitations of the government do not provide justification for failing to pay one's fair share,²¹ nor should

20. Mike Causey, *Is the Bureaucracy Political Football?*, *The Wash. Post*, Apr. 20, 1979, C2.

21. Noncompliant taxpayers resort to a wide range of rationalizations to avoid paying their taxes, including perceived improbability of detection, negative attitudes about the government and the belief that other taxpayers are not paying their taxes. See Steven M. Sheffrin & Robert K. Triest, *Can Brute Deterrence Backfire?: Perceptions and Attitudes in Tax Compliance* (Dec. 7-8, 1990) (available in Tax Notes, microfiche Database Doc. 90-8544 (Dec.

we smile when a citizen escapes the tax snare.

III. THE NEW INTERNAL REVENUE SERVICE POLICY WITH RESPECT TO NONFILERS-VOLUNTARY DISCLOSURE

The Internal Revenue Service has reported that the number of filed income tax returns increased from 110 million in 1988 to 114 million in 1990 and, unfortunately, that the number of nonfilers also rose.²² The report concluded that approximately ten million individuals and businesses do not file income tax returns.²³ During 1991, the inventory of nonfilers rose by thirty percent.²⁴ In response to this problem the Internal Revenue Service has recently reassigned 2000 examining agents the task of locating and contacting nonfilers.²⁵ This allocation of almost ten percent of the audit staff should both reduce the existing inventory of nonfiler cases and identify additional nonfilers. Thus, the existing inventory as of 1991 should decrease, but new nonfiler cases will likely exceed closings.

The income tax gap attributable to nonfilers for 1992 was approximately \$7 billion according to an announcement of the Internal Revenue Service on September 30, 1992.²⁶ Since the estimate of the income tax gap for nonfilers in 1987 was over \$7 billion,²⁷ one senses that either the 1987 figure was inflated or the current projection of the tax gap due to nonfilers is seriously understated. Indeed, Acting Commissioner Dolan recently testified that the tax gap for nonfilers in fiscal year 1992 was over \$10 billion.²⁸

The Internal Revenue Service has, for many years, encouraged nonfilers to get into the system through a voluntary disclosure program. Between 1934 and 1952, it was the policy of the Internal Revenue Service not to recommend criminal prosecution when the taxpayer came forward, made a true voluntary disclosure, and filed an accurate tax return.²⁹ This policy was

17, 1990)); J. Andrew Hoerner, *Why Comply? Michigan Conference Focuses on Why Taxpayers Do Not*, 49 *Tax Notes* 1294, 1295 (Dec. 17, 1990).

22. I.R.S. News Rel. 92-5 (Jan. 17, 1992), 1992 CCH ¶ 46,164.

23. *Id.*

24. *Id.*

25. I.R.S. News Rel. 92-94 (Sept. 30, 1992), 1992 CCH ¶ 46,553.

26. *Id.*

27. Internal Revenue Service, U.S. Dep't of the Treasury, Pub. No. 7285, *Income Tax Compliance Research: Gross Tax Gap Estimates and Projections for 1973-1992* 3 (Mar. 1988) (available in *Tax Notes*, microfiche Database Doc. 88-2718 (Mar. 28, 1988)).

28. Dolan, *supra* note 13.

29. See Harry G. Balter, *Tax Fraud and Evasion* ¶ 4.01 (5th ed. 1983 & Supp. 1 1993); Theron L. Caudle, *How the Department of Justice Operates in Income Tax Fraud Cases*, 87 *J. Acct.* 206 (1949). Caudle points out that the voluntary disclosure policy began in 1934 and was publicly discussed in 1945 by then Secretary of the Treasury Frederick M.

Vinson. *Id.* at 213-14. See also Denzil Y. Causey, Jr., *The Tax Practitioner* 7-5 to 7-6 (1984) (discussing legal strategy under current Internal Revenue Service policy); *United States v. Hebel*, 668 F.2d 995 (8th Cir.), cert. denied, 456 U.S. 946 (1982) (affirming convictions of taxpayers who voluntarily disclosed filing false returns).

The most comprehensive review of the voluntary disclosure policy of the Service can be found in congressional hearings. In 1952, Representative Cecil R. King, as Chairman of the Subcommittee on Administration of Internal Revenue Laws of the House Committee on Ways and Means, conducted an intensive and extensive inquiry into the internal practices of the Service with respect to how voluntary disclosure, health conditions of the taxpayer, and other relevant matters impact on the decision of the Service to recommend criminal tax prosecution. See *Proposals for Strengthening Tax Administration: Hearings on Administration of the Internal Revenue Laws Before the Subcommittee on Administration of the Internal Revenue Laws of the House Committee on Ways and Means, 82d Cong., 2d Sess. (1952)* [hereinafter *Proposals*]. Richard C. Schwartz, the then Assistant Head, Penal Division, Bureau of Internal Revenue, provided specific testimony concerning the long and ambiguous policy of the Service with respect to voluntary disclosure. *Id.* at 103-66. The internal policy was first formally adopted on August 22, 1919, although there was a prior negative policy on the compromise of criminal prosecutions dating back before September 12, 1912. *Id.* at 138-39. The 1919 policy as stated was:

In cases where voluntary disclosure is made of deficiencies through intentional evasions which, if discovered by internal revenue officers, would be made the basis of criminal prosecution, it will be the policy of the Bureau to impose maximum civil penalties and accept offers in compromise of the criminal liability, instead of instituting prosecution and insisting on jail sentence.

Id. at 139. A similar statement of internal policy was announced on July 2, 1934, in a confidential written statement from Commissioner Guy T. Helvering, which was approved by Secretary of the Treasury H. Morgenthau, Jr. *Id.* at 139-142. The policy was not made public until 1945 when it was included in various announcements by Service and Treasury officials. *Id.* at 139-50. The policy was formally withdrawn on January 10, 1952. *Id.* at 151. The entire text of the policy reversal is as follows:

Secretary Snyder announced today that the Treasury Department has abandoned the policy under which criminal prosecution has not been recommended in cases where taxpayers made voluntary disclosures of intentional violation of the internal revenue laws prior to the initiation of the investigation by the Bureau of Internal Revenue. This action was recommended by Commissioner Dunlap. In connection with this change of policy, the Secretary issued the following statement:

While it has been the long-established policy of the Treasury Department to refrain from recommending criminal prosecution where taxpayers make voluntary disclosure of intentional tax evasion prior to the initiation of an investigation by the Bureau of Internal Revenue, it has been concluded that such policy will no longer be followed. Litigation in the courts in recent years has illustrated the controversial nature of the question as to what constitutes a true voluntary disclosure in fact. In the administration of the policy it has been difficult and at times impossible to ascertain whether the disclosure was made because the taxpayer realized he was under investigation or whether the disclosure was in fact voluntary and in

formally abandoned on January 10, 1952.³⁰ Thereafter, voluntary disclosure was considered merely as one of the factors in deciding whether to file criminal charges.³¹

Termination of the policy in 1952 was based, in part, on the fact that it created an opportunity for taxpayers, no matter what the facts were, to claim that they had voluntarily disclosed and therefore could not be criminally prosecuted.³² In light of the resulting litigation, it was natural for the Service to modify the policy from guaranteeing no criminal prosecution to merely considering voluntary reporting as one factor in deciding whether to prosecute. There was also some concern about possible corruption by government officials arising from the discretion inherent in the original policy.³³ After the 1952 change in policy, a taxpayer could no longer argue that voluntary disclosure insulated the taxpayer from a subsequent criminal prosecution. Nevertheless, a "common law" expectation has long continued, derived in part from the past practices of the Service that voluntary disclosure generally would avoid a criminal prosecution, particularly for nonfilers.³⁴

The conclusion which can be derived from this history is that the Internal Revenue Service does not have a formal policy of immunity from prosecution by reason of voluntary disclosure, but may decline criminal prosecution after considering the evidence, including the taxpayer's voluntary disclosure. Notwithstanding the "common law" expectation, a tax adviser could never assure a taxpayer that there will not be criminal prosecution. Clearly, counsel's advice regarding voluntary disclosure presents not only a difficult question because of the potential for criminal prosecution of the

reliance on the immunity held out by the policy.

The intensified enforcement activities of the Bureau's special tax fraud drive and racket squads throughout the country are ferreting out the willful tax evaders, and resulting in recovery of the additional taxes and penalties due the Government. It is the policy of the Treasury Department to recommend criminal prosecution in every case where the facts and circumstances warrant that action.

Id. at 151-52. The purpose behind the public announcement of the voluntary disclosure policy in 1945 was primarily to produce revenue collections from sources which could not otherwise be discovered. Id. at 152-53. The extent to which the policy did generate increased tax revenues, and the extent to which its withdrawal caused a decrease in revenue are unknown. Id. at 152-52, 161-62. The most complex difficulty in administering the voluntary disclosure program was fixing the date on which the investigation began. Id. at 160-63. This date was critical for a taxpayer to obtain criminal tax immunity. Id.

30. Proposals, *supra* note 29, at 151-52. See also Harry G. Balter, *Caplin Restates Voluntary Disclosure Policy As Rumors of IRS Change Circulate*, 16 J. Tax'n 104 (1962).

31. Balter, *supra* note 29, ¶¶ 4.02-4.04.

32. See Proposals, *supra* note 29, at 162-63.

33. See, e.g., *Connelly v. United States*, 249 F.2d 576 (8th Cir. 1957).

34. Balter, *supra* note 29, ¶¶ 4.02-4.04.

client, but also because of the potential criminal and ethical exposure of the tax adviser in certain instances where voluntary compliance is not recommended.³⁵

On September 30, 1992, the Internal Revenue Service issued a notice announcing the adoption of a special program to provide comprehensive support for the ten million nonfilers.³⁶ The core of this new program was the realization that many taxpayers who failed to file for one year became frightened about filing a tax return the next year. Thus, there was a "psychological freeze" about facing the issue in successive tax years.³⁷ As part of the program, the Service noted that those who would voluntarily come forward should not fear criminal prosecution. Commissioner Shirley Peterson explained that the Internal Revenue Service would not recommend criminal prosecution of any taxpayer for wrongdoing if such action occurred prior to the initiation of an investigation by the Service.³⁸ This is identical to the terminated voluntary disclosure program, except that it does not provide unconditional "absolute" amnesty from criminal prosecution and it is limited to nonfilers.

Tax advisers and taxpayers welcomed the adoption of this policy. Unfortunately, despite the best intentions of the Internal Revenue Service, the recent policy is still couched in conditional language. Thus, a tax adviser cannot guarantee that voluntary filing will never result in criminal prosecutions. Even Commissioner Peterson's position on the nonfiler policy does not resolve all ambiguities on the issue of criminal prosecution. In an appearance before the Tennessee Tax Institute, she stated that: "The nonfiler program is a long-term effort to improve tax compliance and the whole purpose is to get people back in the system, not to prosecute *ordinary people* who made a mistake (emphasis added)."³⁹ Obviously, this suggests that an "extraordinary person," for example, a drug dealer, may still be subject to criminal prosecution. Thus, although the Service's new policy has been characterized as "a virtual amnesty,"⁴⁰ that characterization is not synonymous with a formalized tax amnesty.⁴¹

35. *United States v. Baskes*, 442 F. Supp. 322 (1977), *aff'd*, 649 F.2d 471 (7th Cir., 1980).

36. I.R.S. News Rel. 92-94 (Sept. 30, 1992), 1992 CCH ¶ 46,553.

37. *Id.*

38. *See id.*

39. I.R.S. News Rel. 92-114 (Dec. 7, 1992), 1992 CCH ¶ 46,669.

40. Nagle, *supra* note 19, at 833 (noting a statement of Steven Harris, a Miami tax practitioner, indicating that the nonfiling program of the Internal Revenue Service is "virtual amnesty" from prosecution). Acting Commissioner Dolan and Acting Assistant Attorney General, Tax Division, James A. Bruton disagreed with the view of Harris that the term amnesty was an accurate description of the nonfiler program. *Id.*

41. IRS Official Says Taxpayers Should Not Expect Announcement of Full Tax

Some authorities have been troubled by the degree to which a taxpayer could rely on the internal practice of the Internal Revenue Service with regard to voluntary disclosure as a bar to prosecution. The new policy, as now formalized, applies only to nonfilers of income tax returns and remains subject to certain conditions which remain entirely within the discretion of the Service. The voluntary policy would not apply to a drug dealer or anyone else whose source of income is an illegal activity or to a situation which presents an "egregious" failure to file. Nor does this new policy apply to tax evaders who have filed fraudulent income tax returns. In addition, tax practitioners who failed to file an income tax return might face disbarment from practice before the Service unless certain provisions of Internal Revenue Service Circular 230 are revised.⁴²

Unfortunately, because of the limitations on the policy with respect to nonfilers, a tax adviser cannot guarantee that voluntary filing will preclude criminal prosecution. Thus, even though the American Bar Association tax section has fully cooperated with the Internal Revenue Service in assisting taxpayers in filing income tax returns,⁴³ there is no absolute assurance that those taxpayers will not be prosecuted. It is probably true that earners of modest amounts of income who have not previously filed for a limited number of taxable periods do not have to fear criminal prosecutions, however other earners of income still face a degree of anxiety and some, such as drug dealers, face a high probability of criminal prosecution.

While one may applaud the Service with respect to its policy

Amnesty, *Daily Tax Rep.*, (BNA) (Jan. 7, 1993). Acting Commissioner Dolan stated, on January 6, 1993, before the Bentley College Center for Tax Studies 15th Annual Institute on Federal Taxation, that, while the principal thrust of the nonfiling program is not one of criminal prosecution, the "IRS has stopped short of promising amnesty to all nonfilers because some cases are so egregious and so significant that the IRS will introduce criminal prosecution." *Id.* Frank Wolpe, Director of the Center for Tax Studies at Bentley College expressed the concern that some career members of the Criminal Investigations Division might attempt to end run the program by making early contact with nonfilers before they come in voluntarily. *Id.* Notwithstanding, Acting Assistant Attorney General James A. Bruton has said that the Service has not recommended criminal prosecution in any case where the taxpayer participated in the nonfiler program. Nagle, *supra* note 19, at 833.

42. See Nagle, *supra* note 19, at 833. At the mid-year meeting of the American Bar Association Tax Section, Internal Revenue Service Director of Practice Leslie S. Shapiro expressed the view that Internal Revenue Service Circular 230 would be amended so that tax professionals who had failed to file an income tax return, but had then come forward and voluntarily filed a return, would receive a letter of reprimand rather than face possible disbarment. Former Commissioner Shirley Peterson stated that the Tax Section had been informed that there are a shocking number of tax practitioners, including attorneys and certified public accountants, who have not filed. *Id.*

43. *Id.* More than 300 American Bar Association members have assisted the Service in the nonfiler program through telephone assistance and on-site tax clinics. *Id.*

regarding nonfilers, the policy should be revised so that all conditions limiting its application are “formally” withdrawn. A simple and unconditional tax amnesty for nonfilers of income tax returns is appropriate. In addition, the program should not be limited to income tax returns, but should apply to all types of returns, for example, information, excise, employment or other similar returns which are required to be filed.⁴⁴ Since the government needs revenue, and participation by more taxpayers necessarily increases tax revenue, the burden of taxation will be reallocated so that each taxpayer’s share of the pain will, at some point, be reduced.⁴⁵ A revised nonfiler policy of this nature allows for correction of the collective and intentional failures of those taxpayers who have, for one reason or another, failed to file a return and pay taxes. The cost will be acceptable to many so long as such policy generates substantial increases in tax revenue.

In addition to the elimination of criminal prosecution, a number of the civil tax penalties should also be waived. Under the existing policy of the Service, certain civil penalties may be waived if the taxpayer establishes reasonable cause for his or her failure to file. It does not make sense to impose the full range of civil penalties where the amount of such penalties is in excess of the amount the nonfiling taxpayer reasonably can pay in light of his or her economic circumstances. Obviously, an increase in the number of installment agreements or offers-in-compromise due to inability of the nonfiler to pay such penalties frustrates one of the primary purposes of the program—payment of past taxes. But the imposition of penalties may limit the effectiveness of the new policy in getting taxpayers on the rolls for future tax “contributions.” Indeed, it may be that fear of civil penalties is one of the reasons some taxpayers cannot come out of the cold; they cannot afford to pay. The program should be designed to reach the primary objective—voluntary compliance!

IV. ENFORCEMENT OPTIONS OF THE INTERNAL REVENUE SERVICE

The reason behind a policy of no absolute amnesty from criminal prosecution for nonfilers arises, presumably, from an internal debate between

44. IRS Looking to Expand the Non-filer Program to Employment and Other Taxes, *Daily Tax Rep.*, (BNA) (Feb. 19, 1993). Because some nonfilers have failed to file other tax returns, they are reluctant to make a voluntary disclosure about their failure to file an income tax return. Internal Revenue Service Chief Operations Officer Dave Blattner and Internal Revenue Service Compliance 2000 Executive Marshall Washburn have informally indicated that the Service is considering expanding its nonfiler program to other returns such as excise and employment tax returns. *Id.*

45. This assumes the government will not increase expenditures as new revenues are generated.

different elements of the Service. One group, composed of computer-oriented managers, recognizes that fear of prosecution and/or civil audits as the principal mechanism for voluntary tax compliance is no longer sufficient if the Service is successfully to meet its onerous administrative responsibilities into the next century. The other group believes, based largely on past practices, that the primary method of maintaining or increasing tax compliance is through increased audits⁴⁶ and criminal enforcement. According to Acting Internal Revenue Service Commissioner Dolan, data indicates that the degree of compliance is relatively stable.⁴⁷ This begs the question as to whether new approaches, such as the nonfiler program, should be tried and expanded. One senses that behind the Service's new nonfiler program and its recently adopted administrative approach known as Compliance 2000,⁴⁸

46. See Jeffrey A. Dubin, et al., *Penny-Wise and Pound-Foolish: New Estimates of the Impact of Audits on Revenue*, 35 *Tax Notes* 787 (May 25, 1987). Graetz is also of the view that audits are a principal force for deterrence and should be restored to the central place of enforcement. See J. Andrew Hoerner, *Think Incremental Tax Changes, Graetz Tells Compliance Conference*, 49 *Tax Notes* 1271, 1272 (Dec. 17, 1990).

47. Nagle, *supra* note 19, at 834.

48. The Internal Revenue Service, through the leadership of, among others, former Commissioner Shirley Peterson and former Assistant to the Secretary of the Treasury for Tax Policy Fred T. Goldberg, adopted a new approach with respect to administration of the tax laws under the policy known as Compliance 2000. [See *Testimony Before the Subcomm. on Treasury, Postal Service and General Government of the House Comm. on Appropriations*, 103d Cong., 1st Sess. (1993) (testimony of Michael P. Dolan).] The focus of this program is to increase voluntary compliance, reduce taxpayer burdens, and improve productivity and customer service. A main feature of this program is to treat the taxpayer as a customer or client of the Internal Revenue Service. Regional Commissioner Leon Moore, in discussing elements of the recently announced nonfiling program of the Internal Revenue Service, stated this change in policy was part of a new policy to make the Internal Revenue Service more "user-friendly." [Internal Revenue Service Regional Commissioner Leon Moore, *Address at the Central Region Internal Revenue Service and Bar Association Liaison Meeting* (Nov. 13, 1992); see also, *Internal Revenue Service Regional Counsel Clarence E. Barnes, Jr., Address at the Central Region Internal Revenue Service and Bar Association Liaison Meeting* (Nov. 13, 1992) (expressing similar concerns that compliance achieved solely through fear was becoming outdated). See Kent W. Smith & Loretta J. Stalans, *Encouraging Tax Compliance With Positive Incentives: A Conceptual Framework and Research Directions*, 13 *Law & Pol'y* 35 (1991) (suggesting that positive incentives, rather than threats, punishment and incapacitation, can increase compliance with the tax laws and that additional research is needed on this approach). The Smith and Stalans article includes an excellent bibliography. *Id.* at 50-53.] The taxpayer is now recognized as an important resource who should not live in fear and suspicion of the Internal Revenue Service, but rather should look to the Internal Revenue Service for competent and caring assistance in meeting the complex responsibilities created by the existing tax system. See *IRS Expects Continued Oversight by Appropriations Subcommittee*, *Daily Tax Rep.*, (BNA) G-1, G-2 (Feb. 9, 1993). Acting Commissioner Dolan stated that the "IRS is using a more 'differentiated' approach to the taxpayer community." He explained that taxpayers are broken down into three groups: (1) those in compliance; (2) those who want to be

there are many careerist members within the Service who are willing, with certain restrictions, to innovate and accept responsibility for the possibility that such new programs might not succeed. There is a realization that these new programs might, indeed, provide a catalyst to increase voluntary compliance. The initial report on the nonfiler programs is that over 140,000 taxpayers have made voluntary filings of income tax returns.⁴⁹ Given the modest effort in publicizing the nonfiler program, these results are very promising.

The ongoing conflict concerning the future enforcement policy options of the Service presents a question of intense concern within the Service, and the resolution of that conflict will necessarily have an immense impact upon taxpayer compliance. The Service is facing the choice between either seeking a tremendous increase in its enforcement staff or adopting a new, innovative management approach for the administration of tax laws and effecting an enormous enhancement of its computer resources. There are inherent and serious limitations on maintaining or increasing voluntary compliance through the threat of enforcement. In truth, and apart from the debate over administrative policy, the Service has not been able to sustain the percentage of returns it audits. Over the last ten years there has been a steady decline in the rate from 1.6% of the returns filed in 1983 to less than one percent of the returns filed in 1992.⁵⁰ This significant decrease in the percentage of audits is understandable in view of the budget constraints imposed on the Service, the difficulty of training and maintaining competent agents, and the great increase in the number of returns. Furthermore, information returns and computer matching have most certainly had a positive effect on compliance. Nevertheless, the steady decline in the percentage of returns audited leads to the conclusion that primary dependency on audits by

in compliance but fail to do so because of the burden; and (3) those who are intentionally out of compliance. For the first two groups, Dolan indicated that the Service will be less confrontational and more innovative, but for those intentionally out of compliance, the Service will use its arsenal of enforcement procedures. *Id.* See also Dolan, *supra* note 13. Too often, the typical antagonism between the agency as enforcer and the taxpayer or tax adviser as advocate, are counter-productive, particularly when there exist many ways in which all of the participants can cooperate. The dynamics of an enormous increase in the number of returns filed, the limited audit resources of the Internal Revenue Service, the complexity of the tax system, and the synergistic interaction between all of these factors demands that we seek new ways of designing tax laws to achieve efficient administration and an increase in voluntary compliance.

49. See Dolan, *supra* note 13.

50. *Id.* The percentage of audits has declined from 6.5% of all returns in the mid-sixties to less than 1% today. Hoerner, *supra* note 46, at 1272. Indeed, the long-term increase in the staffing of the Service, when considered with an enhanced budget authority and reduced productivity, places the Service in an awkward position. See F.R. Nagle, *IRS Productivity Dropped Alarmingly During the '80s*, *Magazine Finds*, 49 *Tax Notes* 1274 (Dec. 17, 1990).

the Service is no longer viable for the long term. For that reason and others, the Service will be forced to rely on modernization of computer resources⁵¹ and more innovative approaches to maintain and improve taxpayer compliance under the user-friendly approach associated with its commitment to Compliance 2000.⁵²

51. See Dolan, *supra* note 13, at 10-11. What is envisioned is that modernized computers will perform automated audits. Forms W2 and 1099, as well as other relevant information concerning one's income tax return, will be cross-referenced with the information set forth in the return itself and the computer will be programmed to request certain additional information when it identifies inconsistencies or irregularities. If this data supplies all the needed information to resolve the audit, the computer will either accept the return as filed or send out a 30-day letter proposing adjustments. If the information does not adequately answer the questions raised, the computer will refer the return to an agent for further discussions with the taxpayer. *Id.* The American Bar Association has made comprehensive recommendations regarding implementation of certain changes which would improve taxpayer compliance. See American Bar Association Commission on Taxpayer Compliance, Report and Recommendations on Taxpayer Compliance, 41 *Tax Law.* 329 (1988).

With regard to designing tax forms or laws to increase efficiency, the author believes that structural modifications in tax forms, like the relatively recent requirement that all dependents' Social Security numbers be stated on the return, should be developed. This one structural change caused an amazing decrease in claimed dependents of over 7 million. *Id.* Finally, changes should be made in the structural design of the tax law to decrease the need to verify deductions. See Daniel Feenberg & Jonathan Skinner, Raising Revenue Without Raising Tax Rates, 58 *Tax Notes* 969 (Feb 15, 1993) (discussing, for example, what the increase in standard deduction might do in reducing the number of taxpayers who itemize and how changes of this nature could also increase revenue); see also Charles E. McLure, Jr., The Budget Process and Tax Simplification/Complication, 46 *Tax L. Rev.* 25 (1989); Paul R. McDaniel, Federal Income Tax Simplification: The Political Process, in *Federal Income Tax Simplification* 507 (C. Gustafson ed.) (1979); Deborah H. Schenk, Simplification for Individual Taxpayers: Problems and Proposals, 45 *Tax L. Rev.* 121 (1989).

52. House Comm. on Government Operations, *Tax Systems Modernization: Some Early Observations on Its Progress*, H.R. Rep. No. 388, 102d Cong., 1st Sess. (1991) (available in *Tax Notes*, microfiche Database Doc. 91-10225 (Dec. 9, 1991)). While the modernization of computer resources presents a principal mechanism by which the Service can keep modest pace with the exponential increase in the number of income tax returns and other informational reports, the Service's road to successfully effecting modernization of its computer systems has been uncertain and frustrating. According to this report, the Service is in the third phase of attempting to modernize its antiquated computer systems under a program entitled Tax Systems Modernization ("TSM"). There is a serious question whether the Service possesses the management controls in the areas of procurement and systems development to successfully achieve its modernization objectives. *Id.* at 5. The report concluded with the view that TSM is a critical long-term program, which is not only massive and challenging, but also fraught with risk. *Id.* at 8. With the anticipated 30% annual increase in the number of returns filed through the year 2008, failure to bring this highly complex and advanced computer system on-line could have a disastrous impact on future administration of the tax laws. *Id.* at 18 n.1. See Dolan, *supra* note 13, at 10-11 (providing a current report on TSM); Ford & Evans, *supra* note 13, at 1272, 1273.

V. A COMPREHENSIVE TAX AMNESTY PROGRAM

The current nonfiler program represents only a slight modification of the original administrative approach of the Service to secure voluntary compliance. The Service's recent expansion of its offer-in-compromise program is another change in policy designed with renewed concern for efficient collection of back taxes.⁵³ The nonfiler and the expanded offer-in-compromise programs, along with other similar developments, are moderately daring from the perspective of the historically draconian attitude of the Service. The early returns from these programs are somewhat promising in terms of securing additional tax revenue.⁵⁴ This fact, along with the desperate need for more tax revenue, raises the broader question of whether a comprehensive tax amnesty program ought to be considered by the Clinton administration and Congress. Quite frankly, if innovation and flexibility are the mechanism for private industry to meet the challenges of the next century, then tax amnesty at the federal level may be the mechanism for the government to

53. In the instructions to its Form 656, the Service has stated its policy regarding offers-in-compromise. Department of the Treasury, Internal Revenue Service, Offer in Compromise, Instructions to IRS Form 656 (Rev. Feb. 1992). The Service policy as stated in the Instructions is as follows:

The Service will accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential. An offer in compromise is a legitimate alternative to declaring a case as currently not collectible or to a protracted installment agreement. The goal is to achieve collection of what is potentially collectible at the earliest possible time and at the least cost to the Government.

In cases where an offer in compromise appears to be a viable solution to a tax delinquency, the Service employee assigned the case will discuss the compromise alternative with the taxpayer and, when necessary, assist in preparing the required forms. The taxpayer will be responsible for initiating the first specific proposal for compromise.

The success of the compromise program will be assured only if taxpayers make adequate compromise proposal [sic] consistent with their ability to pay and the Service makes prompt and reasonable decisions. Taxpayers are expected to provide reasonable documentation to verify their ability to pay. The ultimate goal is a compromise which is in the best interest of both the taxpayer and the Service. Acceptance of an adequate offer will also result in creating for the taxpayer an expectation of and a fresh start towards compliance with all future filing and payment requirements.

54. See Rita L. Zeidner, A Year Later, IRS Reports Gains From Offers In Compromise Program, 58 Tax Notes 540 (Feb. 1, 1993) (comparing offer-in-compromise statistics for 1992 with those for 1991). The new offer-in-compromise policy is not only imminently practical but it also benefits both the taxpayer and the government in that it accelerates collection of outstanding taxes while giving the taxpayer a fresh start.

address the increasingly serious problem of noncompliance.

VI. THE TRADITIONAL RESPONSE CONCERNING TAX AMNESTY: INTERNAL REVENUE SERVICE

Since the future is frequently a product of past practices, it is doubtful whether the Service can, or, for that matter, should, ever recommend the adoption of a full-scale tax amnesty program. The Service's traditional mission has been one of enforcement, and thus its organization has been functionally designed to secure compliance through the fear of civil penalties and criminal prosecution. This is not to suggest that there has not been a significant allocation of resources by the Service to develop simplified tax forms, carefully provide instructions, and provide individual taxpayer assistance;⁵⁵ nor is it to suggest that there is not a positive relationship between increasing the percentage of audits and increasing federal revenue.⁵⁶

A policy change to a user-friendly system is simply contrary to the primary mission of the Service as understood over the last 70 years. A policy of tax amnesty, despite the recent changes in the agency discussed above, remains antithetical to the purpose for which the Service was created and the interests of its careerist members who have a vital stake in the continuation of past practices. For example, it was probably not surprising that the Central Intelligence Agency (the "CIA") was totally unable to foresee the collapse of the former Soviet Union and other communist states. The CIA was created to report on the threat that such countries presented to us. It simply was not able to predict the rather startling decomposition of the communist states. Similarly, the Service is not able to be sufficiently objective about a truly radical revision of its approach to the collection of taxes, although it is obvious that harsh realities forced the creation of Compliance 2000.⁵⁷ This is not a criticism of the Service, but rather a description of the obvious nature of the limitations that preclude the Service from recommending such a policy.

More importantly, the question of whether to adopt a comprehensive tax amnesty program presents a purely political issue which must be resolved by President Clinton and Congress. Thus, it would be inappropriate for the Service, on its own, to recommend such a program.

55. Overview, *supra* note 16, at 199-200. The Service has had difficulty securing competent employees to provide taxpayer assistance. In a recent year, 36.3% of all answers provided by the Service to taxpayers were incorrect. The Service attributes this high error rate to inadequate training and high employee turnover. *Id.* (setting forth a brief discussion regarding efforts by the Service).

56. See Dubin, et al., *supra* note 46.

57. See Dolan, *supra* note 13.

This is not to suggest that a federal tax amnesty program would solve the deficit problem, and therefore should be instantly adopted. There are many serious and difficult matters to consider. In 1990, testifying before the House Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations, Fred T. Goldberg, former Commissioner, and Michael J. Graetz, former Deputy Assistant Secretary of the Treasury, outlined a series of significant concerns that support the rejection of a federal tax amnesty program.⁵⁸ Their individual and collective views constitute a compelling case justifying rejection of a federal tax amnesty program. The following were among their major concerns.

1. That the states may have had successful tax amnesty programs does not necessarily mean that a federal tax amnesty program would be successful.
2. Taxpayers who have fully complied with their federal income tax obligations understandably might object to allowing non-compliant taxpayers to be relieved of criminal prosecutions, and perhaps civil tax penalties.
3. The tax amnesty program would not result in a net increase in revenue since there would be offsetting transactional costs.
4. There is no agreement as to how much additional revenue would be collected solely by reason of the tax amnesty program.
5. It is not clear that the Service has sufficient enforcement resources to provide the "stick," after the period of tax amnesty expires, to insure a full harvest of taxpayers who would chose voluntary disclosure.⁵⁹

58. See Graetz, *supra* note 10; Goldberg, *supra* note 10. See also Feasibility and Revenue Impact of a Federal Tax Amnesty Program, Hearings Before the Subcomm. on Commerce, Consumer and Monetary Affairs of the House Comm. on Government Operations, 101st Cong., 2d Sess. (1990). But see Martinez, *supra* note 10, at 563-66 (making a strong statement against the adoption of a federal tax amnesty program from the perspective of fairness, impact on future compliance, and deterrence, among other important concerns).

59. Graetz, *supra* note 10; Goldberg, *supra* note 10. Increased enforcement after the period of tax amnesty is one of the main ingredients to insure success. A comprehensive review of eight state and three European countries' tax amnesty programs revealed the following four conditions for a successful outcome:

- (1) The program must be long enough to allow taxpayers to respond and should not coincide with the regular tax filing season;
- (2) the amnesty program should be accompanied by the enactment of laws for stiffer fines and prison terms for tax evaders;
- (3) audit coverage should be expanded;
- and (4) the amnesty program should be well-publicized.

State, *European Tax Amnesties Surveyed*, 23 Tax Notes 350 (Apr. 23, 1984) (summarizing a recent report by the Congressional Research Service).

It would be impossible to answer these and other questions without (1) analyzing recent data regarding taxpayer compliance; (2) making an effort to realistically determine the amount of net tax revenue that would be generated; (3) assessing the impact on the attitude of compliant taxpayers; (4) assessing the impact on existing civil audit and criminal tax investigations; (5) anticipating the impact on long-term compliance; and (6) determining the ability of the Service, under its current budget constraints, to successfully administer an amnesty program. In short, an intensive analysis must be conducted before these and other issues can be resolved.

It may not be possible to objectively determine whether, all things considered, it makes sense to adopt a comprehensive tax amnesty program. If one were to attempt to design a mathematical approach to answering this question, a number of factors would have to be considered. One would have to determine the present value of short-term and long-term benefits, the associated investment costs, the discounted value of the loss of future revenue, direct and indirect, from a reduction in audit and criminal enforcement activities during the amnesty period, and revenue loss from future noncompliance by present complying taxpayers (who might view such a program as unfair). Any such mathematical formulation would also take into consideration the economic value of fairness to the extent that tax amnesty would create a loss of future revenue from presently compliant taxpayers. It would not address the question of fairness, or of comparable values, from a moral point of view. That is not to suggest that the moral aspects of tax amnesty are irrelevant, but rather that such matters should be considered separately. A specific determination of the net financial increase, if any, to the government under such a comprehensive analysis would inherently be subject to uncertainty.

The present investment costs to be incurred in the implementation of a tax amnesty program may be predictable. Such costs would include not only the direct cost of management training, and advertising, but also the loss of revenue incurred by a reallocation of manpower from audit and criminal investigations to the tax amnesty program. It may be that the present value of the long-term benefits will be the most crucial element to ascertain. If there is a significant increase in new long-term contributing taxpayers, the additional tax revenues realized from them may be the most important issue to focus upon in deciding whether a federal tax amnesty program is worth the considerable risks.

Presently complying taxpayers may be opposed to a tax escape hatch at the federal level, but such taxpayers' institutional habit of compliance—i.e., servitude to following the existing tax norms—probably would not be significantly broken. One may anticipate an initial negative response by the public and some political leaders. However, with appropriate and accurate information, the disclosure of anticipated net economic benefits should be

sufficient to mitigate any serious concerns.

An equally difficult question is what agency or institution should be assigned to conduct the study. It would not be unreasonable for the Government Accounting Office, along with the Joint Committee on Taxation, the Treasury Department, the Congressional Budget Office and the Internal Revenue Service to gather their respective resources to conduct the study and make appropriate recommendations. The Tax Section of the American Bar Association should also be an active participant in such research. Secretary Bentsen and Director Panetta should co-chair the study.

VII. A PROPOSED MODEL FOR A COMPREHENSIVE TAX AMNESTY PROGRAM

Implementation of a comprehensive tax amnesty program would be a task even more complex than the study itself. The following is a list of suggested minimum conditions necessary to provide a realistic opportunity for a federal tax amnesty program to reach its goals.

1. The study should be conducted in secrecy to the extent allowed under existing law.
2. The President must be a participant in announcing the program and a consistent supporter during the period of tax amnesty.
3. There must be a substantial national media effort constantly reinforcing the merits of the program and the consequences of being caught after it closes.
4. The program must be ready for full implementation on the date of the announcement.
5. The duration of the program should be one year; announced on April 16 and available through April 15 of the following year.
6. There should be no conditions concerning the program's applicability during the amnesty period.
7. Tax amnesty should apply to all criminal tax prosecutions and special consideration should be given to the possible waiver of certain civil penalties. Past amnesty programs were limited to only criminal prosecutions.
8. Strict enforcement of criminal and civil tax penalties should apply for the period following the tax amnesty.⁶⁰

60. But cf. Nagle, *supra* note 19, at 834 (during the existing nonfiler program the Service is continuing to regularly refer nonfiler criminal cases to the Department of Justice for

9. The enactment of the program should include a prohibition against enactment of a similar program for the next twenty-five years.⁶¹
10. Any taxpayer who benefits under the program, and who is convicted in a criminal tax prosecution for a later taxable period, would lose all tax benefits of the prior relief and would receive at least a minimum jail sentence.
11. Persons engaged in illegal activities may report the income from such illegal activities and information contained in such tax returns may not be used in other federal criminal prosecutions.⁶²
12. Maximum contemporaneous state participation in the program should also be obtained.⁶³
13. A specific procedure to clarify the date on which the taxpayer made the disclosure should be established; perhaps, a certified filing at a particular office of the Service should be required.

The benefits of such a tax amnesty program are not simply the additional federal revenue generated during the amnesty period, but also the entry of more taxpayers into the system, so that the revenue benefits will

accelerated prosecution during the tax filing season). See James Alm, et al., *Amazing Grace: Tax Amnesties and Compliance*, 43 *Nat'l Tax J.* 23, 24 (1990). Although tax compliance might normally decrease after tax amnesty, if post-amnesty enforcement efforts are increased, aggregate compliance will actually increase. *Id.* But while amnesty programs may be appropriate as a transition to enhance enforcement and generate immediate revenue, such programs may not be effective in identifying tax evaders, resulting most likely in only modest long-term gains. See Ronald C. Fisher, et al., *Participation in Tax Amnesties: The Individual Income Tax*, 42 *Nat'l Tax J.* 15 (1989).

61. Cf. Angelini, *supra* note 10, at 908.

62. Perhaps it is a misallocation of Service resources to use the tax laws as a primary weapon against organized crime because it hinders one of the fundamental objectives of the Service, that is, collecting revenue. Participants in illegal activities are certain that the information contained in accurate income tax returns will be used against them for purposes of other federal criminal prosecutions. Accordingly, many either fail to file or file a fraudulent income tax return. If the information contained in a return were protected from use in a subsequent criminal prosecution, other than a prosecution involving tax violations, it may be possible to induce some of the many persons engaged in illegal activities to file accurate income tax returns. Nevertheless, because of past governmental practices with regard to the use of such information, one would be extremely naive to believe that the announcement of such a change in policy would have an immediate and positive impact on the receipt of tax revenues.

63. Cf. *Tax Compliance: IRS to Give Circular 230 Leniency to Non-Filing Tax Practitioners*, *Daily Tax Rep.*, (BNA) G3, G4 (Feb. 9, 1993) (noting that the Tax Section of the American Bar Association working with the Service has attempted to persuade individual states to use Compliance 2000 guidelines for nonfilers of state tax returns).

extend, on an annual basis, well into the next century.⁶⁴ Clearly, the most pressing question is the amount of new federal revenue generated. An accurate estimate of the tax recovery and net revenue benefit which would be generated by the adoption of a comprehensive tax amnesty program will be far more difficult to predict than our national deficits. Notwithstanding the uncertainty as to the amount of tax recovery and net revenue benefit, one senses that this is the time in our nation for innovation and experimentation in federal tax administration.⁶⁵ The Clinton administration possesses the capacity and energy to face basic realities of health care, federal deficits, increased taxes, domestic investment in the infrastructure, economic expansion, and federal budget cuts—why not the question of a broad-based tax amnesty program? The time for a comprehensive study of a federal tax amnesty program is now.

VIII. CONCLUSION

The historic approach used to improve tax compliance has been premised on audits and criminal prosecution. In more recent years, Congress

64. Although, in 1986, one authority expressed the view that the net revenue from federal tax amnesty would only be approximately \$1 billion, he still was of the view that federal tax amnesty may be appropriate.

If there are no prospects of significant revenue from a Federal tax amnesty, should use of an amnesty be opposed? The answer is "not necessarily." There are reasons for tax amnesties apart from revenue. An amnesty may be an equitable way of allowing people to turn over a new leaf and become compliant. More importantly, an amnesty may be perceived as a useful, equitable, and necessary tool when major changes are made in a tax system or when a major effort to increase compliance is undertaken....

Thus, the arguments for and against amnesty must be based on equity and on long-run compliance effects. Would an amnesty be equitable both to those who have abused the tax system in the past and to those who have paid all of their tax obligations? To a large extent, the answer to this question involves political judgment. But that judgment might be based on whether an amnesty would improve long-run compliance, thereby helping to reduce the tax burdens of those who have been compliant. If an amnesty does permanently return people to the tax system and does raise revenue for an extended period of time, the equity argument could tilt in favor of amnesty. Thus, the wisdom of tax amnesties cannot be determined until more is known about their long-run compliance effects.

Allen H. Lerman, *Tax Amnesty: The Federal Perspective*, 39 *Nat'l Tax J.* 325, 331 (1986).

65. But see Martinez, *supra* note 10, at 538. Martinez is of the view that the present adoption of federal tax amnesty would constitute an uncontrolled experiment in a national laboratory where actual results would, under current information, be no better than a guess. *Id.*

has enacted a series of new civil penalties to increase the cost of playing the audit lottery. The current change in the administrative policy to make the Service more "user-friendly" and to treat taxpayers as "customers" raises the risk of an increase in noncompliance. Nevertheless, there are other factors, such as the volume of tax returns, the inherent complexity of the tax law, and the decrease in the percentage of returns audited, forcing dissolution of the ancient regime of fear. In the next century, the Service may be forced to adopt a "user-friendly" policy because the time and cost of an enforcement regime is no longer effective. Indeed, the consistent decrease in the percentage of returns audited alone suggests that this is occurring well before a formal readjustment of administrative policy is fully developed by the Service. It is doubtful that a specific resolution of administrative choices will occur in the near future. Rather, an amalgamation of the two primary techniques will take place, with increased emphasis on one or the other for the reasons expressed herein. Hopefully, the "user-friendly" approach, as expanded through modernized computer resources, and the enactment of tax laws with administrative efficiency as a main concern, will become the primary means of achieving future tax compliance.

With respect to the principal and more specific issues discussed in this comment regarding adoption of a comprehensive tax amnesty, the case for re-examination exists and the opportunity for a broad-based review awaits the decision of the Clinton administration. A federal tax amnesty program is not a panacea, but rather a very complex and uncertain opportunity.⁶⁶

66. The first reading assignment for any task force assigned to review the issue of tax amnesty would be the King Report. See *Proposals*, supra note 29. This report is as current with respect to the important legal issues concerning the administration of tax amnesty as any existing report. One senses that it should have been fully reviewed by the Service before it began its "mini-amnesty" program for nonfilers.