

OPTIONS FOR EXPANDING THE
REMEDIES TO ADDRESS TAXPAYER
RIGHTS VIOLATIONS

Options for Expanding the Remedies to Address Taxpayer Rights Violations¹

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EXECUTIVE SUMMARY

Most U.S. taxpayers willingly meet their obligation to tell the government about their filing status, family structure, earnings, investments, expenses, and losses in an honest effort to pay the correct amount of tax. This willingness places a heavy responsibility on the IRS to treat these taxpayers fairly — in ways that comport with concepts of procedural justice. Failure to do so reduces our tax system to one based on compulsion alone, undermining our system of voluntary compliance. Moreover, survey results suggest that the perception that the IRS is fair promotes voluntary compliance. Thus, strengthening taxpayer rights could both make the tax system more fair and raise revenue.

While Congress has enacted various taxpayer rights, survey results suggest that less than 50 percent of taxpayers believe they have rights, and even fewer know what their rights are. Perhaps taxpayer rights are easy to forget because taxpayers feel they have no recourse when the IRS violates them. While remedies exist for some, they may be too costly or time consuming for many to pursue.

This study discusses ways to improve remedies available for the violation of taxpayer rights. One option adopted by the Republic of Chile is to expand the authority of the judiciary to quickly and efficiently remedy violations of taxpayer rights. Another option adopted by Australia and the United Kingdom is to empower the tax administrator — or the National Taxpayer Advocate — to make *de minimis* “apology” payments to those whose rights were violated, as previously recommended by the National Taxpayer Advocate.

INTRODUCTION**Most people pay taxes voluntarily.**

Taxpayers paid about 83.1 percent of their taxes voluntarily and timely (\$2.21 trillion of the \$2.66 trillion due), and the IRS eventually collected another two percent through late payments or enforcement actions (\$65 billion out of \$2.66 trillion).² In other words, taxpayers voluntarily and timely paid about 34 times as much as the IRS will eventually collect through enforcement and voluntary late payments. Similarly, of the \$2.4 trillion in tax revenue received by the IRS in FY 2011, direct enforcement revenue accounted for only \$55.2 billion, or about two percent.³ The remaining 98 percent resulted from voluntary compliance.

Taxpayer rights promote voluntary compliance.

Some people may argue that compliance is not really “voluntary” if people comply only because of the risk of being caught and penalized if they do not (*i.e.*, because of “economic

² See IRS Research, Analysis & Statistics, *Federal Tax Compliance Research: Tax Year 2006 Tax Gap Estimation* (Mar. 2012), available at <http://www.irs.gov/pub/irs-soi/06rastg12workppr.pdf>.

³ Government Accountability Office, *GAO-12-165, IRS's Fiscal Years 2011 and 2010 Financial Statements 23* (Nov. 2011), available at http://cfo.fin.irs.gov/4all_docs/docs/gao_reports/financial_audits/gao12165.pdf.

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deterrence”). However, scholars have concluded the probability of getting caught cheating is so remote that it is irrational to comply just to avoid being penalized.⁴

In response to the IRS Oversight Board’s annual survey, 89 percent of taxpayers responded that personal integrity influences their tax compliance whereas only 59 percent cited the fear of an audit — results are similar to those generated every year since 2004.⁵ These results are consistent with the notion that people voluntarily comply with tax laws for a variety of reasons other than economic deterrence.⁶

A recent TAS study found a correlation between voluntary compliance by small businesses and the perception that the IRS is fair.⁷ Thus, when taxpayers perceive the IRS is overreaching, they may lose faith in the system and voluntary compliance may decline. By contrast, when they perceive the IRS has fair procedures that embody taxpayer rights, those perceptions may increase the taxpayer’s willingness to reciprocate by voluntarily complying. At present, taxpayer rights show that the government respects taxpayers, and in response, taxpayers are more likely to show respect for the government by paying taxes. Thus, increasing the awareness of existing taxpayer rights could increase voluntary compliance.

Most taxpayers do not believe they have rights or do not know what they are.

In response to a nationwide survey of U.S. taxpayers, only 46 percent said they believed they had rights before the IRS.⁸ Further, when asked if they knew what their rights were, only 11 percent responded “Yes,” while 64 percent responded “No” or “Not Sure,” as shown by the table below.

⁴ This is so even after accounting for the fact that some people incorrectly compute the probability of detection and others are averse to risk. See, e.g., Richard Lavoie, *Flying Above the Law and Below the Radar: Instilling a Taxpaying Ethos in those Playing by their Own Rules*, 29 *PAGE L. REV.* 637, 640-642 (2009) [hereinafter *Lavoie 2009*] (summarizing tax compliance research). For further discussion of taxpayer beliefs regarding audit probability, see Sarah B. Lawsky, *Probably? Understanding Tax Law’s Uncertainty*, 157 *U. PA. L. REV.* 1017, 1023 (2009).

⁵ IRS Oversight Board, 2011 Taxpayer Attitudes Survey 5 (Jan. 2012), available at <http://www.treasury.gov/irsob/reports/2012/IRSOB~Taxpayer%20Attitude%20Survey%202012.pdf>.

⁶ See, e.g., National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 138-50 (Marjorie E. Kornhauser, *Normative and Cognitive Aspects of Tax Compliance*) [hereinafter *2007 Review*] (summarizing existing literature).

⁷ See *Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*, *infra/supra* [hereinafter *Voluntary Compliance Study*]. This survey of Schedule C filers found that those in the “high-compliance” group expressed more positive views about the government, a preparer, and the IRS than those in the “low-compliance” group. Notably, less than half of all respondents agreed that the IRS treats taxpayers fairly (42 percent overall agreed or strongly agreed), but those in the high-compliance group were more likely to hold this view (47 percent agreed or strongly agreed vs. 42 percent for the low-compliance group). *Id.*

⁸ Forrester Research Omnibus Mail Survey for the Taxpayer Advocate Service (Sept. 17, 2012) [hereinafter *2012 Forrester Survey*].

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TABLE 1, Views About Taxpayer Rights⁹

Responses (Percent)	Yes	No	Not Sure	No Answer
As a taxpayer, do you believe you have rights before the IRS?	46	9	20	25
Do you know what your rights are as a taxpayer when dealing with the IRS?	11	23	41	25

While Congress has enacted at least three “Taxpayer Bill of Rights” (TBOR) laws,¹⁰ these data show that less than 50 percent of taxpayers believe they have rights before the IRS and even fewer know what they are.¹¹

Re-codifying existing taxpayer rights and responsibilities could help taxpayers remember them and improve compliance.

Noting the wide variety of complicated taxpayer rights scattered throughout various laws, the National Taxpayer Advocate recommended that Congress enact another Taxpayer Bill of Rights (TBOR) to re-codify and summarize taxpayers’ existing rights and responsibilities by grouping them into the following simple, easy-to-understand categories:¹²

Taxpayer rights:¹³

- Right to be informed;
- Right to be assisted;
- Right to be heard;
- Right to pay no more than the correct amount of tax;
- Right to appeal;
- Right to certainty;
- Right to privacy;
- Right to confidentiality;
- Right to representation; and

⁹ 2012 Forrester Survey.

¹⁰ See, e.g., Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) [hereinafter *RRR 98*]; Taxpayer Bill of Rights, Pub. L. No. 104-168, 110 Stat. 1452 (1996); Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342.

¹¹ 2012 Forrester Survey.

¹² For the proposal and a detailed analysis of each specific right, see National Taxpayer Advocate 2011 Annual Report to Congress 493-518 (Legislative Recommendation: *Enact the Recommendations of the National Taxpayer Advocate to Protect Taxpayer Rights*) and National Taxpayer Advocate 2007 Annual Report to Congress 478-489 (Legislative Recommendation: *Taxpayer Bill of Rights and De Minimis “Apology” Payments*). For legislative activity incorporating this recommendation in whole or in part, see Taxpayer Bill of Rights Act of 2010, S. 3215, 111th Cong., H.R. 5047, 111th Cong. (2010), H.R. 5716, 110th Cong. (2008).

¹³ These categories of taxpayer rights and responsibilities are very similar to those present in all tax systems surveyed by the Organization for Economic Co-operation and Development (OECD). See OECD Committee of Fiscal Affairs Forum on Tax Administration, Centre for Tax Policy and Administration, GAP002, *Taxpayers’ Rights and Obligations* 3 (2003), available at <http://www.oecd.org/ctp/taxadministration/14990856.pdf> (analyzing survey results published in 1990); Adrian J. Sawyer, *A Comparison of New Zealand Taxpayers’ Rights with Selected Civil Law and Common Law Countries — Have New Zealand Taxpayers Been ‘Short-Changed’?* 32 VAND. J. TRANSNAT’L L. 1345 (1999).

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- Right to fair and just tax system.

Taxpayer responsibilities:

- Obligation to be honest;
- Obligation to cooperate;
- Obligation to provide accurate information and documents on time;
- Obligation to keep records; and
- Obligation to pay taxes on time.

Restating taxpayer rights and responsibilities would also remind taxpayers that rights imply responsibilities. When the government establishes, communicates, and respects taxpayer rights, it also shows taxpayers that the government respects its citizens. Research suggests that some taxpayers are likely to respond by making an extra effort to pay their taxes voluntarily and timely.¹⁴

Providing adequate and accessible remedies could help taxpayers remember their rights and improve compliance.

It may be easy for taxpayers and the IRS to forget about taxpayer rights when Congress has not provided an adequate, easily available remedy for the violation of those rights. Some remedies may be inadequate because they penalize the IRS without directly addressing harm to the taxpayer. For example, an IRS employee may be terminated for certain violations of taxpayer rights.¹⁵ Other remedies may be adequate, but are not widely accessible because they are burdensome to pursue. For example, a taxpayer may recover actual civil damages in limited circumstances when the IRS violates certain privacy protections, fails to release a lien, or recklessly, intentionally, or negligently disregards the law or regulations in connection with the collection of federal tax.¹⁶ However, it can take years for a taxpayer to exhaust his or her administrative remedies and obtain actual damages in court.

There is no judicial remedy for the violation of administratively-created rights. For example, taxpayers generally have no recourse when the IRS fails to follow the Internal Revenue Manual (IRM) or other administrative guidance.¹⁷

¹⁴ See, e.g., *Voluntary Compliance Study*; Lavoie 2009.

¹⁵ RRA 98 § 1203(b) (the so-called “ten deadly sins”).

¹⁶ See, e.g., IRC §§ 7431 (damages for unauthorized disclosure of return information); 7432 (damages for failure to release lien); 7433 (damages for unauthorized collection actions by the IRS); 7433A (damages for unauthorized collection actions by contractors); 7435 (damages for unauthorized enticement of information disclosure); 7426 (actions brought by a person other than the taxpayer for unlawful levy actions). In limited circumstances, a taxpayer may be reimbursed for costs incurred by taxpayers protesting alleged IRS abuses or defending against IRS litigating positions that are not “substantially justified.” See IRC § 7430. Taxpayers who seek assistance from TAS may be eligible for the equitable remedy of a Taxpayer Assistance Order (TAO) under the authority granted to the National Taxpayer Advocate by IRC § 7811.

¹⁷ See, e.g., *Avers v. Comm’r, T.C.* Memo. 1988-176 *63 (“the I.R.M. requirements are merely directory rather than mandatory, and noncompliance does not render respondent’s actions invalid.”); *but see* IRC § 7811(a)(3) (“In cases where any Internal Revenue Service employee is not following applicable published administrative guidance (including the Internal Revenue Manual), the National Taxpayer Advocate shall construe the factors taken into account in determining whether to issue a Taxpayer Assistance Order in the manner most favorable to the taxpayer.”).

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Similarly, taxpayers do not always have a remedy when the IRS violates taxpayer rights enacted by Congress. For example, they may not have an adequate remedy when the IRS sends a notice that proposes or determines a tax deficiency, but does not adequately describe the amount and basis for any tax, interest, and penalties due, as required by law.¹⁸ Nor do taxpayers have a remedy when the IRS sends manually-generated correspondence that does not include the name and telephone number of an employee that the taxpayer can contact, which is also required by law.¹⁹

In other cases, even judicial remedies may seem inadequate. For example, the IRS is required to notify taxpayers before contacting third parties who may have information necessary to determine the taxpayer's liability.²⁰ This approach provides the taxpayer the opportunity to submit the information first, and avoid the third-party contact and resulting damage to his or her reputation.²¹ If the IRS fails to do so, the taxpayer may seek to quash a third-party summons.²² However, failing to provide pre-contact notice may damage the taxpayer's reputation or business — damage that cannot be undone by quashing a summons.

Another example of an overly narrow remedy involves the taxpayer's right to appeal an IRS-determined deficiency to the U.S. Tax Court. A taxpayer generally has the right to petition the court within 90 days after the IRS mails a notice of deficiency (or "statutory notice").²³ When the IRS does not send a statutory notice timely, the period during which the taxpayer may file a petition is automatically extended (*i.e.*, the period remains 90 days from when the IRS mails the notice). This remedy may be overly narrow if the taxpayer is reasonably relying on a representative to respond and the IRS sends the notice to the taxpayer, but does not send it to the representative, as required.²⁴

¹⁸ IRC § 7522(a) ("An inadequate description ... shall not invalidate such notice"); *Shea v. Comm'r*, 112 T.C. 183 (1999) *nonacq.*, A.O.D. 2000-08 (shifting the burden of proof to the IRS when the notice fails to adequately describe the basis for the tax deficiency pursuant to IRC § 7522). Merely shifting the burden of proof will not always redress the harm resulting from the failure to explain the basis for the liability shown as due on certain notices, as most taxpayers do not seek review in the Tax Court, and those that do may not always seek to recover litigation costs.

¹⁹ RRA 98, Pub. L. No. 105-206, § 3705, 112 Stat. 685 (1998).

²⁰ IRC § 7602(c).

²¹ S. Rep. No. 105-174, at 77 (1998) ("taxpayers should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties."). Commentators have argued that the IRS circumvented the purpose of this right by interpreting it to require merely sending "Publication 1," which contains a generic notice that the IRS may contact third parties in connection with an examination, at the beginning of the examination process, rather than informing the taxpayer that a specific contact is contemplated closer in time to when the contact will be made. See Kevan P. McLaughlin, State Bar of California Tax Section, *Balancing Privacy and Efficiency Under Section 7602: What Is "Reasonable Notice" and Changing IRS Procedures Related to Third Party Contacts* (2012).

²² See *e.g.*, *Gangi v. U.S.*, 107 A.F.T.R.2d 2011-1542 (D.N.J. 2011).

²³ IRC § 6213.

²⁴ See, *e.g.*, Form 2848, *Power of Attorney and Declaration of Representative* (2012) (providing a checkbox to indicate if the power of attorney is to receive copies of all correspondence); IRM 4.8.9.11.2 (June 14, 2011) (instructing IRS employees to send the statutory notice to those indicated on Form 2848). A broader remedy applies in New York where the period for filing an appeal is tolled if the taxpayer's representative is not served with the notice of deficiency. See, *e.g.*, *In re Hyatt Equities, LLC*, 2008 N.Y. Tax LEXIS 94, *13 (N.Y. Tax 2008) ("While the Tax Law does not specifically provide for the service of a statutory notice on a taxpayer's representative, we have held that the 90-day period for filing a petition or request for conciliation conference is tolled if the taxpayer's representative is not served with the statutory notice"); *In re Gurwin*, 2009 N.Y. Tax LEXIS 53, *14 (Apr. 30, 2009) ("Although not mandated by statute, case law has established that the 90-day period for filing a petition is tolled if the taxpayer's representative is not served with the statutory notice").

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As these examples illustrate, existing remedies for violations of taxpayer rights are sometimes unavailable, inaccessible, or inadequate. Observing this deficiency, some have proposed a more general remedy for damages.²⁵ Moreover, there are no remedies for violations that cause frustration, confusion, anxiety, or wasted time, rather than actual damages. Thus, Congress should consider expanding these remedies to demonstrate that meaningful taxpayer rights actually exist.

DISCUSSION

Chile has potentially broad judicial remedies for the violation of taxpayer rights.

In 2010, Chile codified various taxpayer rights, which were similar to those recommended by the National Taxpayer Advocate in her 2011 annual report to congress, and provided a remedy to taxpayers whose rights are violated.²⁶ The legislation gave taxpayers the right to:

1. Be treated courteously, respectfully and considerately; to be informed and assisted by the Service about the exercise of their rights and compliance with their obligations;
2. Obtain complete and timely refunds prescribed by the tax laws, adjusted for inflation;
3. Receive information, at the initiation of every act of auditing, about the nature and scope to be reviewed, and to know at any moment their tax situation and the stage of the procedure;
4. Be informed about the identity and contact information of the functionaries of the Service under whose responsibility the matter at issue is proceeding;
5. Obtain copies, at their cost, or certification of the action taken or of the documents presented in the proceedings, under the terms prescribed by the law;
6. Be exempted from bringing documents that are not responsive to the proceeding or that already have been brought with them to the Service and to obtain, once the case is finalized, the return of the documents originally brought;
7. Have tax returns, save those in cases of legal exceptions, retain a confidential character, in the terms prescribed by the tax code;
8. Have the actions carried out without delay, unnecessary requirements or waiting, upon receipt of all the solicited records by the functionary in charge;
9. Formulate allegations and to present records within the parameters prescribed by the law and to have those records incorporated into the proceeding at issue and duly considered by the competent functionary; and

²⁵ See, e.g., Leandra Lederman, *Of Taxpayer Rights, Wrongs, and a Proposed Remedy* 87 Tax Notes 1133, 1142 (May 22, 2000) (concluding that “[a]lthough many provisions enacted by the three taxpayer bills of rights... may be beneficial to taxpayers involved in disputes with the IRS, these bills have not afforded remedies to the taxpayers they sought to protect” and proposing a general private right of action for damages for violations of the law, regulations, or internal procedures); Steve Johnson, *A Residual Damages Right Against the IRS: A Cure Worse Than the Disease*, 2000 TNT 137-88 (July 17, 2000) (critiquing the proposal); Leandra Lederman, *Taxpayer Rights In the Lurch: A Response To Professor Johnson*, 88 Tax Notes 1041 (Aug. 21, 2000) (responding to Professor Johnson).

²⁶ Cód. Trib., Tit. Preliminar, Pár. 4º, Art. 8º bis, as amended by Ley No. 20.420 (2010).

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10. Raise, in a respectful and convenient form, suggestions and complaints about the actions of the Administration in which they have an interest or which affect them.

The remedy for a violation of these rights is relatively swift and widely accessible. Within 15 days of the violation, a taxpayer can bring the complaint in writing before the recently created Tax and Customs Court without an attorney.²⁷ The tax agency has ten days to respond.²⁸ Assuming there is an actual case or controversy, the Tax and Customs Court will open a probative term of ten days during which the parties must submit their proof in writing. The court then has ten days to render a judgment. According to the new law:

The decision will contain all the measures that the Court deems necessary to restore the rule of law and ensure the proper protection of the applicant, without prejudice to any other rights that may be asserted against the authorities or the courts.²⁹

The new law does not specify the scope of these “measures.”³⁰ However, the law has the potential to provide a quick and broad new remedy for any violation of taxpayer rights that could be considered for adoption by the U.S.

Australia and the U.K. have adopted “apology” payments (or equivalent) as a remedy for the violation of taxpayer rights.

As discussed in the National Taxpayer 2007 Annual Report to Congress, Australia and the United Kingdom have adopted “apology” payments (or an equivalent) as a remedy for the violation of taxpayer rights.³¹ The National Taxpayer Advocate included a recommendation in that report for Congress to adopt a similar system in the U.S. The proposal would grant non-delegable, discretionary authority to the National Taxpayer Advocate to make a payment of up to \$1,000 to a taxpayer where the action or inaction of the IRS caused excessive expense or undue burden, and the taxpayer experienced a “significant hardship” within the meaning of IRC § 7811.³²

The rationale for an apology payment is not to fully repay the taxpayer for his or her time and frustration, but to serve as a symbolic gesture to show that the government recognizes

²⁷ Cód. Trib., Libro Terº, Tit. III, Par. 2º, Art. 155 and 157.

²⁸ *Id.* Art. 156.

²⁹ *Id.*

³⁰ At least one decision under the new law is posted at www.tta.cl (last visited Oct. 31, 2012). See *Re Alvarez Escudero*, Tax & Customs Tribunal of Tarapaca (Oct. 25, 2011) (rejecting a taxpayer's claim that the Chile Tax Service violated his rights in failing to pay a refund allegedly withheld by a third party, concluding that the claim was untimely and without merit).

³¹ National Taxpayer Advocate 2007 Annual Report to Congress 478-489 (Legislative Recommendation: *Taxpayer Bill of Rights and De Minimis “Apology” Payment*); Australian Tax Office, *Applying for Compensation*, available at <http://www.ato.gov.au/corporate/content.aspx?doc=/content/48904.htm> (generally called compensation for detriment caused by defective administration (“CDDA Scheme”) or “act of grace” payments); HMRC, *Complaints and Putting Things Right*, available at <http://www.hmrc.gov.uk/factsheets/complaints-factsheet.pdf> (called payments of “redress”). The UK’s “Adjudicator” recommended payments of redress by the HMRC of £299,872 during 2010-2011. Adjudicator’s Office Annual Report 12 (2011), available at <http://www.adjudicatorsoffice.gov.uk/publications.htm>.

³² National Taxpayer Advocate 2007 Annual Report to Congress 478-489 (Legislative Recommendation: *Taxpayer Bill of Rights and De Minimis “Apology” Payment*). The aggregate payments under this authority would be limited to \$1 million per year unless otherwise authorized by Congress. *Id.*

its mistake and the taxpayer’s burden. These payments might enhance taxpayers’ perception of the IRS and the tax system as just and fair. The National Taxpayer Advocate could also include a general description of apology payments authorized during the preceding year in her annual reports to Congress, which would keep Congress and the IRS apprised of the nature of significant IRS errors and highlight areas that might warrant attention by policymakers.

CONCLUSION

While remedies exist for the violation of some taxpayer rights, they may be too costly or time consuming to pursue. In any event, most taxpayers do not believe they have any rights before the IRS or do not know what they are, perhaps because existing remedies are inadequate or inaccessible. If Congress believes additional remedies are needed to make taxpayer rights more meaningful, one option, adopted by Chile, is to expand the authority of the Judiciary to quickly and efficiently remedy violations of taxpayer rights. Another option, adopted by Australia and the United Kingdom, is to empower the National Taxpayer Advocate to make *de minimis* “apology” payments to those whose rights are violated. These measures could improve voluntary compliance by showing taxpayers that the IRS and the tax system are fair.