**Statement of**

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**Prepared for**

**The Subcommittee on Oversight**
**Committee on Ways and Means**
**United States House of Representatives**

**Regarding the Subcommittee's Hearing on**

# "IRS Reform: Resolving Taxpayer Disputes"

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# Introduction

Chairman Buchanan, Ranking Member Lewis, and Members of the Subcommittee, it is a great honor for me to provide comments today for your hearing, "IRS Reform: Resolving Taxpayer Disputes."

My name is Pete Sepp and I am President of National Taxpayers Union (NTU), a non-partisan citizen group founded in 1969 to work for less burdensome taxes, more efficient, accountable government, and stronger rights for all taxpayers. More about our work as a non-profit grassroots organization, and the thousands of members we represent across the nation, is available at www.ntu.org.*

Although we advocate for many structural changes to the tax system, from the comprehensive to the incremental, one common aspect on which NTU often specifically focuses is the *administrability* of such proposals. As policymakers define the rates, bases, deductions, credits, and other features of a tax system, what will the practical impact be on taxpayers' lives and their rights? Unless this question is adequately addressed, the result will be a tax system that burdens all and serves none. Taxpayers will be more fearful or mistrustful of their government, revenue officials will encounter greater difficulty in performing their public service, tax practitioners will become increasingly frustrated with complex rules, and all sectors of the economy will pour too many productive resources into compliance.

For these reasons, throughout its history NTU has led efforts in support of Congressional legislation to improve operations of the Internal Revenue Service (IRS) and provide greater balance in the tax enforcement process. During the late 1970s and 1980s, NTU informed Congress of taxpayers who experienced IRS maladministration firsthand, as well as organized a large coalition of civil liberties organizations that successfully persuaded Congress to enact the first "Taxpayers' Bill of Rights" as part of the Technical and Miscellaneous Revenue Act of 1988.

In 1997, NTU's then-Executive Vice President David Keating was named to the National Commission on Restructuring the Internal Revenue Service ("Restructuring Commission"), a federal panel whose recommendations later became the basis for the most extensive IRS overhaul in a generation. More recently we worked with the IRS National Taxpayer Advocate (NTA) and Congress in promulgating and finally codifying (in 2015) a set of 10 fundamental taxpayer rights.

This hearing is being held amid discussions of systemic tax reform – an exercise that NTU wholeheartedly supports.  I wish to note at the outset, however, that even if Congress were not contemplating major revisions to the rates, base, and other operational aspects of the Tax Code, most of the proposals and policies discussed here can and should be able to stand on their own.

The following testimony is intended only to provide highlights surrounding taxpayer dispute resolution issues. They should be viewed through the broader prism of taxpayer rights and tax administration policy.

Over the past three years, I have been asked to testify before Subcommittees of the House Small Business Committee, and have submitted comments to the Senate Finance Committee, the Treasury, and the White House Transition Team on various aspects of tax administration. Some of these commentaries and analyses have been updated or modified for inclusion in various portions of this document.

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**As a matter of organizational policy National Taxpayers Union neither seeks nor accepts any kind of grant, contract, or other funding from any level of government.*

# I. Resolving Disputes: The Remedies behind Rights

Since NTU's founding, a fundamental element in the quest for an administratively equitable tax system has been remedies for when that equitable treatment falls short. It is therefore no surprise that most taxpayer rights laws have striven for either new procedures to resolve tax disputes or safeguards to help existing mechanisms work better. Among these:

- The Taxpayers' Bill of Rights in the 1988 Technical and Miscellaneous Revenue Act directed the IRS to create an administrative appeal procedure for liens, empowered what was then called the Taxpayer Ombudsman to issue Assistance Orders, allowed taxpayers to recover damages for certain unauthorized IRS actions, and strengthened taxpayer protections during the conduct of field audits.
- "Taxpayers' Bill of Rights II" in 1996 replaced the Ombudsman's office with a much more effective Taxpayer Advocate capable of assisting taxpayers more fully, established administrative review when installment agreements were terminated, expanded the availability of offers-in-compromise, and placed the burden on the IRS of proving its position was substantially justified if a taxpayer who wins a dispute sought a cost and fee award.
- The IRS Restructuring and Reform Act of 1998 ("RRA 98") further augmented the powers of the Taxpayer Advocate, altered burden of proof standards for factual issues in certain tax cases, sought to solidify taxpayer appeal rights, and set into motion other dispute resolution remedies described in sections to follow.
- The Protecting Americans Against Tax Hikes (PATH) Act of 2015 set into law 10 principles guiding administration of the tax system; three of the most relevant of these for purposes of resolving disputes are the "Right to Challenge the IRS's Position and Be Heard," the "Right to Appeal an IRS Decision in an Independent Forum" and the "Right to a Fair and Just Tax System."

Last year, House Ways and Means Committee Chairman Brady released a blueprint for tax reform entitled "A Better Way." This plan envisions a new tax administration authority whose functions will be divided along the lines of a families and individuals unit, a business unit (for firms of all types), and a "small claims court" independent of these units. A new commitment to individualized taxpayer assistance and a "Service First" mission that adheres to the PATH Act's taxpayer rights principles would be instituted. The post of Commissioner would be replaced by an Administrator who could serve no more than two three-year terms.

NTU believes that many elements of this approach have a great deal of promise to improve tax dispute resolution procedures. Yet, we also believe the job of protecting taxpayer rights will never be finished. As the Tax Code, the economy, and technology are all constantly evolving in new directions, so must the laws designed to prevent abuse of authority and provide appropriate remedies when such abuse occurs.

The following sections will explore the current challenges in doing so, both within the context of "A Better Way" and in other scenarios.

## II. Why is Reform Still Needed? A Case Study in Small Businesses

Prior to reforms enacted in the 1988-98 period, taxpayers had only a few options in disputing an IRS assessment that did not involve considerable expense and time. Given the progress made since then, is it even necessary to consider additional steps? The circumstances that continue to surround small business taxpayers provide some clues.

In NTU's experience, IRS treatment of the small business community has historically served as a barometer for systemic reforms of the tax laws as well as tax administration. Thus, many of the first Americans to approach NTU's advocacy staff and share "horror stories" of treatment by the Internal Revenue Service were small business owners.

This is generally because they face the least ideal situations. Their tax returns tend to be more extensive and complex than that of a non-business household, yet they often lack the resources of larger businesses to maintain full-time tax compliance employees. A September 2014 report for the National Association of Manufacturers calculated that the regulatory cost *per worker* for all tax compliance activities in firms of any size was a whopping $960 (using 2012 data and expressing in 2014 dollars). For companies with fewer than 50 employees, the tab was much worse – over 50 percent more, at $1,518 per worker.

They are also likelier than other non-business households to come in contact with examinations, appeals, and other parts of the dispute resolution system. For example, the *IRS Data Book* indicates that the examination rate for all "large corporation" tax returns was 11.1 percent in Fiscal Year 2015, compared to 0.9 percent for "small corporations." On the other hand, businesses declaring income through the 1040 tax return instead of a corporate form do have much higher audit rates than the general filing population. Depending on the income level of the business, the rate can be three times higher than that of all individual tax returns, or even eight times higher than nonbusiness returns without Schedules C, E, F, or Form 2106.

The fact remains that some of the most contentious issues surrounding tax disputes center upon, or are a consequence of, audits. These matters range from the clarity and certainty of the laws themselves, to appeals of audit results, to IRS employee conduct, and to remedies in the courts.

Ranking Member Nydia Velázquez of the House Committee on Small Business eloquently summed up the problem in an opening statement from 2013, when she observed that, "In the past, small businesses have told us that complexity and uncertainty create difficulty when filing tax returns. Many business owners worry that one simple mistake can lead to a costly and timely audit. And, at a time when many businesses are striving to expand, every hour and dollar counts."

For businesses of all sizes, those dollars and hours add up quickly. An annual study published by our research affiliate, National Taxpayers Union Foundation (NTUF), calculated that for this year the federal personal and corporate tax system extracted 6.98 billion hours and $262.6 billion out of the economy (a trend that has been worsening). Other analyses suggest that two-thirds or more of these sums would be attributable to the business sector, including corporations, partnerships, and sole proprietorships. Unfortunately, these considerable outlays and resources do not buy peace of mind for small business owners who, as Ranking Member Velázquez stated, often operate in fear of vague laws being used against them.

Uncertainty has also crept its way into the audit selection process itself. A Government Accountability Office (GAO) report issued in January of 2016 on the Small Business/Self Employed (SB/SE) division of the IRS concluded that the "lack of strong internal control procedures" in the agency's 33 work streams for identifying and reviewing returns for possible audit "increases the risk that the audit program's mission of fair and equitable application of the tax laws will not be achieved." The term of "fairness" in selecting returns was unclear or even contradictory in how it was defined among IRS staff, while "documentation and monitoring procedures were inconsistent" for ensuring that selection procedures met internal controls. Flawed inputs like these could have real-world consequences in terms of the effectiveness of audits for the government and equitable treatment for taxpayers.

Previous taxpayer rights laws have certainly improved audits and auditor behavior. Still, members of the tax representation community have observed that the conduct and attitudes of audit personnel have not been subjected to the same level of regulation as personnel involved in collection. A passage from a 2012 article appearing on AOL News by Ross Kenneth Urken, personal finance editor for TheStreet.com, is particularly illuminating:

> In response to the 'storm trooper' reputation, the IRS publicly tried to clean up its act during the Clinton administration. Yet most of the changes it made had to do with collections, according to Anthony Parent, the founding partner of IRS Medic, a law firm oriented toward those with tax troubles. There was a lot of congressional testimony about revenue officers' abuses, but there was no censuring of abusive auditors, nor were any concrete limitations placed on their powers. …
>
> Given that the typical auditor today was just a kid during the Clinton administration, Parent says, the public now can still expect 'skittish' auditors who 'if pushed into a defensive position, will lash out at a taxpayer.'

To this day, taxpayers and advisers continue to report on troublesome developments in IRS audits that range from isolated cases to broader policies. Here I am indebted to Daniel J. Pilla (an author and tax litigation expert), Leonard Steinberg, E.A. (a New York area tax representative), NTU's members, and others for providing me with background information on their challenges:

- Some auditors continue to ignore or deny protocols in the Internal Revenue Manual, including "audit reconsideration" procedures when, for instance, an individual files an amended return that could obviate the need for continuing an examination.
- IRS delays in resolving some cases allow the statutory clock to keep ticking on interest that is almost never abated, even though the agency's own lack of follow-up may be to blame.
- In other areas, however, "Speed Up Audits," brought on by what some say is a reduction in IRS enforcement resources, may be leading taxpayers to a financial dead end. Writing in *The New York Times* in 2015, Dave Du Val of TaxAudit.com explained that, "Examiners for the I.R.S. are giving taxpayers and their accountants much less time to respond to certain audit letters. … An initial request for an appointment is followed quickly – in some instances, on the same day – with a follow-up letter that states that the requested information has not been received." That second letter contains a threat that failure to respond to the first notice could result in loss of appeal rights. A taxpayer in this situation has little, if any, time to consider even a basic response, much less an appeal.
- The IRS "rounds up" in making its case against taxpayers. Restaurants, for example, become targets through no fault of their own because of the IRS's fixation on credit-card transactions as part of the audit determination process. These transactions include taxes and tips, generating an artificially larger cash-flow than records which would reflect only actual sales of menu items.
- Innocent "chit chat" between auditors and taxpayers can become the basis for wider investigations. An auditor might innocently raise the topic of where the citizen might have last gone for vacation, or ask for advice on buying a car based on what the taxpayer owned.

Correspondence from the IRS can intimidate as well, whether intentionally or not. According to Daniel J. Pilla, who has decades of experience in helping thousands of clients, the Revenue Agent's Report (RAR) mailed with the post-audit "30-day letter" can be misunderstood. As he wrote in his recent book, *How to Win Your Tax Audit*, "Citizens commonly mistake the RAR for a bill, which it is not. They do not understand that it is merely a proposed change, which they can appeal."

Thus, by its very nature, any IRS examination involves a considerable expenditure of time, effort, and money on the part of the business owner and the owner's professional advisors. Substantiating deductions or reconciling income often requires gathering or producing copious records. The owner's mental energy is shifted away from maintaining or growing the business and toward meeting what can seem like an endless list of IRS demands. And of course, the out-of-pocket expense for financial and legal advisors can take on enormous dimensions, sometimes out of proportion to the amount of tax at issue. With so much at stake, one would be led to believe that most small businesses would appeal adverse IRS determinations. This is not the case, and the reasons merit further analysis.

According to the *IRS Data Book*, 29 percent of all field audits and 57 percent of all correspondence examinations of small corporations in Fiscal Year 2015 involved no proposed change to the taxpayer's liability. Among 1040 returns reporting business income, the percentages were generally smaller, although those with business receipts above $200,000 subject to correspondence audits had a no-change rate of above 50 percent.

It is clear that the number of small business taxpayers who actually appeal their audits is quite low. There are several ways of measuring the appeal rate, but *Data Book* presentations show that 6,291 taxable nonfarm 1040 returns with business income of under $200,000 involved "unagreed recommended additional tax" out of 191,501 returns in that category examined. Even after throwing out "no change" returns and recommended decreases in tax liabilities, from these statistics alone the rate of appeals in audit situations appears to be paltry, hovering somewhere below 5 percent.

Is this apparent low frequency of disputes simply attributable to the IRS being correct in the position it takes from the vast majority of examinations? Numerous authorities, from prominent members of the tax advisory community, to the Government Accountability Office, to the National Taxpayer Advocate, would answer, not at all.

Many business people told lawmakers in hearings during the 1980s and 1990s that they believed the cost of disputing an IRS tax bill – even if they knew the agency was wrong – simply became too prohibitive. To be sure, appeal and abatement processes for audits have improved over time in terms of accessibility and affordability for taxpayers without extraordinary means. Unfortunately, many Americans facing IRS demands still felt helpless. According to a 1995 study by Daniel J. Pilla:

> The average individual face-to-face tax audit led to the assessment of $4,780 in additional tax and penalties, not including interest. However, just 5 percent of those found to owe more money appealed [*Pete Sepp comment: note 2015 statistics above showing how little this figure seems to have changed*]. The 5 percent number is significant in this way: the GAO has proven that the IRS's computer notices are wrong 48 percent of the time. Still, 95 percent of the public is persuaded that IRS audit results are correct or not worth fighting. That testifies to the degree to which the IRS has the public convinced that it cannot win when challenging an audit.

In short, all too many Americans thought it was cheaper to pay what the IRS said they owed rather than fight. Consider, for example, the average additional recommended tax in 2015 resulting from field audits of business 1040 tax returns with receipts between $25,000 and $100,000 – a total bill of $9,947 per return. Imagine the decisions this audited business owner – the very definition of "the little guy" – would face.

If he or she hires a tax professional for representation, the average fee, according to the National Society of Accountants' most current public data, would be $150 per hour. It would not be unusual for the accountant to spend 10 hours on this stage of the audit. Should the initial examination go against the owner, he or she could choose to retain the accountant for the administrative appeals process, perhaps involving an additional 10 hours of time. Meanwhile, the owner could have easily spent 10-20 hours of time gathering records, reviewing paperwork, etc., at an average compensation amount (according to the National Association of Manufacturers study mentioned previously) of $48.80 per hour.

To get this far into the audit process, the owner could have already spent roughly $4,000, more than one-third of the contested bill. Should the administrative route fail, the owner then has broad options to file a Tax Court petition or try to litigate in federal court. While many Tax Court petitions never advance, and often lead to settlements, this process could easily consume another 10 hours of a legal professional's time (at likely a higher rate of compensation). Should litigation actually take place, a qualified tax attorney might demand $300 per hour or more. If the owner prevails, his or her ability to recover the entirety of fees like these remains doubtful. The maximum amount that can be awarded is barely $200 per hour, and only if the court determines the IRS's position was not "substantially justified."

In a 2013 *Wall Street Journal* article, respected tax lawyer Robert Wood estimated that over the past decade, he identified at least 22 taxpayers involved in IRS disputes who received some kind of attorney compensation or litigation costs from courts, "although some rewards may later have been reduced." Other award cases may exist but their prevalence remains rare.

On the other hand, the IRS's litigation resources against small businesses are formidable. Over the past ten Fiscal Years, the IRS Chief Counsel's Office has typically closed some 70,000 "tax enforcement and litigation" cases per year. Roughly ¾ of those cases fell under the category of "Small Business and Self-Employed."

Confronted with this type of calculus, along with the "fear factors" described above, it is little wonder that many businesses are forced into either conceding completely to the IRS's position or making a compromise that substantially weakens their balance sheets. The latter course can actually backfire on the government, should the business become so infirm that it no longer is able to deliver receipts to the Treasury. In this context, striving to provide better tax dispute resolution processes makes perfect sense.

## III. The Right to Appeal: A Concern for All Taxpayers

Dispute resolution is not confined solely to controversies involving small amounts or minor points of law. In fact, a set of issues stemming from examinations in the Large Business and International (LB&I) division of the IRS has implications for all taxpayers.

In recent years the IRS has envisioned shifting its LB&I examination focus away from industry-specific clusters and toward nine practice areas, four of which are regionally oriented and the remaining five subject-oriented (e.g., enterprise activities, pass-through entities, cross-border activities, withholding and individual international compliance, and treaty and transfer pricing operations). The LB&I audit approach is to be issue-based, outcome-driven, collaborative, and transparent.

In 2015, National Taxpayers Union enthusiastically joined as a member of the Coalition for Effective and Efficient Tax Administration (CEETA), which was formed to constructively engage both the Treasury and Congress on audit process issues as the LB&I reorganization took place. CEETA is comprised of more than a dozen trade associations and citizen groups.

Because it is so remarkably broad, this coalition has been able to gather the experiences of numerous companies and unify them around several themes embodying opportunities to improve the way business (and in some aspects individual) tax audits should be conducted. These themes were contained in an extensive November 2015 memorandum to IRS officials:

**Lack of Centralized Management and Accountability in Audits.** Under the new LB&I auditing process, more than one practice area (e.g., a regional area and an expertise area) may be assigned to a single audit. In addition, the IRS's chains of command for domestic and international audit issues are split. How will the IRS's personnel lines of reporting and most importantly, decision-making authority, be allocated in such a situation?

**Lack of Transparency.** Nowhere is greater transparency more urgent than in the way official guidance over highly complex issues raised in audits is promulgated through the IRS Chief Counsel. CEETA has determined that over the past 15 years, there has been a dramatic shift toward relying upon less formal Chief Counsel Advice (CCAs), which generally have no taxpayer participation, and away from Technical Advice Memorandums (TAMs), which require agreement between the taxpayer and the IRS on the facts surrounding a given question.

This development has serious downstream effects. CEETA noted in its November 2015 communication, "The lack of taxpayer involvement is bound to result in a less robust consideration of the facts and the issue. The use of CCAs can also hinder the resolution of cases in the Office of Appeals because Appeals officers may be disinclined to engage on an issue" after a CCA has been disseminated.

**Breakdowns in the Information Document Request (IDR) Process.** Through peer review, the IRS's own staff have acknowledged that IDRs are a major impediment to the workflow of audits. In 2013 LB&I clarified procedures for all IDRs going forward, requiring them to be issue-focused, discussed with the taxpayer prior to issuance, and guided by a deadline negotiated between the taxpayer and the agency.

Unfortunately, the execution of these otherwise sound procedures has been uneven and erratic. Problems have been reported such as IDRs with overbroad issue focuses, or "kitchen sink" IDRs for all types of irrelevant information before the initial audit conference has begun. Moreover, examiners have issued multiple IDRs with the same deadlines, or have requested information for tax years or entities not under audit. These problems and others can make the new process chaotic.

**Delays in Closing Cases and Honoring Estimated Completion Dates.** As noted previously, businesses have been experiencing both frustrating delays and demanding accelerations of audits at the hands of the IRS. In the case of LB&I, the prospects for resolving or appealing audits are less tenable. Increasingly, taxpayers are receiving multiple requests for extending the statutory period of examination, while estimated completion dates established in audit plans have become less meaningful.

The Catch-22 becomes evident in the Appeals division's policy requiring that 12 months always remain in the statutory examination period; this becomes a justification for the IRS to continue the audit rather than conclude the case. Taxpayers can never actually avail themselves of an appeal, and are forced into Tax Court.

**A Litigation Mentality as Opposed to an Issue Resolution Mentality.** In some instances CEETA members have observed that IRS exam teams seem more occupied with "preparing for litigation rather than ascertaining the correctness of a return and resolving issues." The end result "negatively affects the cooperative relationship, impedes transparent interaction, decreases efficiency, increases costs, and delays certainty for both taxpayers and the Service."

CEETA has identified several key matters that should be addressed through legislation in this Congress – while prudent inputs and adjustments can still be most effectively absorbed into the IRS's LB&I audit strategy. They are:

**Properly Limiting the Designated Summons.** Although the IRS has the conventional power to summon testimony and documents in examinations, the designated summons is a special authority intended, according to a top IRS audit official, for situations "only after the taxpayer under examination refuses to extend the statute of limitations … and the examiner has exhausted all other means to obtain the needed information." The designated summons, unlike conventional summonses, will act to suspend the assessment period when a court proceeding is brought to enforce or quash it. As a consequence, the designated summons can, if employed improperly, compel taxpayers into nearly endless extensions of the statutory examination period.

Until quite recently, designated summons enforcement was quite rare. But as CEETA's memo warns, "current and former IRS officials have publicly commented that designated summonses will become a more frequent IRS management tool." It bears mentioning here that like many weapons, the designated summons can be effective when employed as a threat, not just a reality.

**Better Defining Circumstances for Designating Cases for Litigation.** Just as the designated summons was designed to be used only under special circumstances, the IRS has given itself the authority – when approved by high-level agency and Chief Counsel officials – to force a case or audit issue into the courts. This power has never been authorized by Congress. It is again, intended to be wielded infrequently because doing so strips a taxpayer of the right to an administrative resolution unless the taxpayer unconditionally surrenders their position on the issue. IRS guidelines indicate that cases suitable for designation are those that "present recurring, significant legal issues affecting large numbers of taxpayers … and there is a critical need for enforcement activity with respect to such issues" (e.g., tax shelters).

In theory this power, carefully employed, could function effectively. But as CEETA notes, when used with less circumspection, or even threatened, designation has raised "concern [among taxpayers] regarding the predictability of their own audits and in particular the availability of Appeals."

**Ending the Improper Use of Private Contractors in Examinations.** In 2015, Senate Finance Committee Chairman Orrin Hatch made an important inquiry to Commissioner Koskinen regarding a $2.2 million contract extended to a private law firm in a large corporate audit; this contract permitted examination activities from the firm best described as overbearing and harsh. Chairman Hatch stated:

> The IRS's hiring of a private contractor to conduct an examination of a taxpayer raises concerns because the action: 1) appears to violate federal law and the express will of the Congress; 2) removes taxpayer protections by allowing the performance of inherently government functions by private contractors; and 3) calls into question the IRS's use of its limited resources.

From NTU's standpoint, the IRS's action is fraught with additional risks. Allowing more entities access to confidential taxpayer information only raises the likelihood of additional data security breaches in the future, on top of several recent hacking incidents and a continuing plague of tax-related identity theft. Furthermore, if the agency is allowed to continue this practice, by issuing a "temporary regulation" without a comment period or notification, the door will be open for other grave trespasses against taxpayers' rights affecting many constituencies.

**All of These Factors, and More, Undermine Taxpayer Rights to Appeal.** The Office of Appeals is approaching its 90$^{th}$ year of service, while the IRS Restructuring and Reform Act of 1998 created "firewalls" between Appeals and compliance functions as well as directed the Commissioner to ensure availability of impartial appeal options. Most recently the 2015 taxpayer rights legislation affirmed that a taxpayer should be able to disagree with the Service's positions. Yet, these assurances are becoming eroded in a number of ways. Taxpayers need, and deserve, definitive statutory protections that provide, in crystal-clear detail, their right to appeal an audit without the duress of capitulating.

Daniel J. Pilla was among the first members of the tax representation community to recognize the danger that LB&I's approaches would pose to other types of taxpayers. In his 2014 book, *How to Win Your Tax Audit*, Pilla wrote:

> At the time of issuance, the [IRS's LB&I] memo was pointed at only large businesses. However, it is clear that the agency will push the practices 'more deeply' into the system, exposing more taxpayers to their pitfalls. I fully expect the IRS to utilize 'strong arm' tactics more often in pressing for documents in all audits, particularly those related to business income and particularly with respect to computerized recordkeeping systems. … I fully expect [the policy] to migrate deeper into the IRS sooner rather than later.

More recently, in an April 19th 2016 endorsement letter, the Small Business and Entrepreneurship Council (SBEC, a CEETA member) expressed just how relevant CEETA's stance was to its many thousands of supporters across the country:

> Small business owners do not have the resources to endure audits without end. They certainly do not have the resources to go up against a powerful $1,000-an-hour legal team in a tax dispute, Indeed, it's not hard to see how powerful, private attorneys doing the most complex and sensitive work of the IRS could lead to abuse and harassment, not to mention expensive legal bills.

Those who believe the IRS would never hire such "big guns" to pursue smaller businesses' tax liabilities should bear in mind that decisions by auditors and Appeals officers are guided first and foremost by the facts and the law. While the agency will weigh the danger of setting an adverse precedent for the government if a case might wind up in court, the "nuisance cost" is not a formal determinant. Even so, the opening given the IRS by this questionable practice could easily permit private attorneys commanding somewhat lower rates to routinely involve themselves in cases involving smaller liabilities.

There is a larger point to be explored here. How meaningful is the distinction between small and large businesses for the purposes of audits? LB&I's jurisdiction encompasses a wide range of entities called "large corporations," including not just major multinational firms but companies with assets at a minimum level of $10 million. Granted, the latter entities can hardly be described as "mom and pop" concerns, but neither are they massive conglomerates. They could be "hometown" companies employing several dozen, rather than thousands, of individuals. Census Bureau statistics show that an establishment of any type reporting receipts of between $35 million and $39.99 million had a payroll averaging fewer than 50 employees. Even those establishments in the $10 million-$14.99 million receipt category, an amount that still seems quite large, employed an average of fewer than 40. Assets and annual receipts are two different statistical snapshots, but they are often closely related parts in the mural of a company's finances.

Finally, audit and enforcement actions pursued against the very largest American businesses have "ripple effects" in the small business community that works with them. Large multinationals tend to have supplier, distributor, or contractor networks numbering hundreds or even thousands of member businesses. These often-small entities suffer adverse consequences to their own bottom lines when their larger customers must alter expansion plans or reconfigure business models due to tax concerns.

Ultimately the tax system must be viewed holistically. Otherwise, the rights of individual and business taxpayers become categorized, divided … and conquered by bureaucratic overreach.

# IV. Alternative Dispute Resolution: Why Is the U.S. Lagging?

Given all of the developments described in the previous two sections of this testimony, one goal of taxpayer rights advocates has been to establish a less formal, less expensive way for taxpayers to obtain justice. The National Commission on Restructuring the IRS gave extensive consideration to improving Alternative Dispute Resolution (ADR) methods for use in federal tax controversies, including mediation as well as binding arbitration. Limited procedures were in place at that time, applying primarily to cases of over $10 million or more. ADR at the tax agency was a relatively new concept, following passage of the government-wide Administrative Dispute Resolution Act of 1996.

Ultimately, the Commission did not make major recommendations in this area, although the subsequent 1998 RRA did remove the dollar threshold, and establish a pilot program for binding arbitration. Unfortunately, the usefulness of ADR for most taxpayers has so far been questionable. As the Subcommittee is well aware, the National Taxpayer Advocate's 2016 Annual Report to Congress has made the IRS's failure to "effectively use ADR" as #15 on the "Most Serious Problems" list.

It is clear that when ADR is employed, the results are generally encouraging. For "Fast Track Settlement," which applies to factual and legal disputes during an examination, the average settlement rate for FY 2016 was above 80 percent and the average time to resolution was less than two months. At the same time, the utilization rate of ADR is pitiably low, at less than one half of one percent of all cases in the IRS Appeals division and dropping.

Why is all of this happening? It seems implausible, for example, that unlike taxpayers in other nations, Americans would prove uniquely resistant toADR. As the NTA's report pointed out, survey data indicates that more than 4 in 5 business people "report that arbitration is a fair and just process." Nor does the U.S. government seem uniquely unable to implement such reforms. The Environmental Protection Agency and the Social Security Administration are just two of several federal-level practitioners of ADR.

The NTA identified several reasons why the potential of ADR has yet to be fully achieved in tax matters. We offer the following observations of contributing factors, in order of priority.

**Intentionally Narrow Scope.** In a sense, ADR at the tax agency is a self-selecting process from the start. Most "Campus Collection" (e.g., non-field) cases are not eligible for ADR, as are cases which, in the IRS's opinion, could have "controlling precedent." Equally difficult is the fact that the IRS can refuse to engage in ADR when a taxpayer requests it.

**Lack of Perceived Impartiality.** Private-sector arbitration or mediation usually involves a completely neutral third party with no prior direct knowledge of the case or its parties. This is somewhat more difficult to achieve in public sector settings, since a specialized level of expertise as well as a government-supported forum are usually necessary. Nonetheless, as the NTA has pointed out, other federal agencies house their mediators in a stand-alone department staffed specifically for the purpose of ADR proceedings.

Not all ADR data is encouraging, but it is instructive. Post Appeals mediation cases in FY 2016 involved only about one-fourth of all ADR proceedings, with settlements of barely more than 10 percent. These cases can be especially difficult to settle, given their nature of taking place between the point of appeals and potential litigation. Still, it cannot be helpful that the mediator involved in this particular interaction is selected from the regular caseworker pool of the Appeals division to interact between the auditing team and the taxpayer.

NTU is long familiar with this perceived (and occasionally genuine) conflict of interest in tax cases. One hurdle that the older Problem Resolution Program for assisting taxpayers was that its staff were often housed in the very same IRS district office whose personnel were the subject of the taxpayer's complaint. Bob Kamman, an Arizona attorney who advised NTU on taxpayer rights matters, noted in testimony to Congress that sometimes a problem resolution officer would even refer that complaint directly back to person responsible for the problem, instead of his or her supervisor or another office. This perception took considerable effort to overcome on the part of the National Taxpayer Advocate.

**IRS Culture Has Yet to Fully Adapt.** The Internal Revenue Manual itself states that "mediation programs achieve [the] objective" of resolving "tax controversies at the lowest level without sacrificing the quality and integrity of those determinations." Yet, the Agency has often applied the ADR term loosely to processes that many experts would not characterize as such. These include Collection Due Process Appeals and the Collection Appeals Program. There is a tendency for any large agency or business to redefine existing operations to appear as if it is embracing change. But the IRS's culture has often presented especially difficult challenges. As the IRS Restructuring Commission's report indicated, "the culture of IRS is overly risk averse," and there is a "lack of structure to improve operations." Some 20 years later, this culture has been evolving, but not necessarily at the pace to support full implementation of ADR. Fast Track Settlement, to give one example, was not extended to small business and self employed taxpayers until late 2013.

**Lack of Consistent Evaluation.** Other federal entities (as well as international tax authorities) have attempted to measure the time and cost benefits of ADR for themselves and for taxpayers. The results are reported in various parts of this testimony. Yet, this presents a "chicken and egg" problem for the IRS. With so few cases currently being processed through ADR, would this type of data be statistically sufficient and valid to encourage further participation? Frankly, the agency has little choice in the matter but to proceed, even with what could be described as a limited data set. For ADR to take root and flourish in the field of tax disputes, even preliminary findings would be helpful. So would an honest evaluation of the agency's efforts to promote these ADR options, especially if Congress decides to instruct the IRS to expand them.

## V. Resolving Taxpayer Disputes – New Approaches

With the 20th anniversary of RRA '98 approaching, it is fitting that the Subcommittee embrace the tradition of thoughtful, bipartisan cooperation that has succeeded in making a major difference in the lives of everyday taxpayers who, for one reason or another, encounter the IRS after filing their returns. Accordingly, NTU makes the following recommendations concerning resolution of taxpayer disputes, which involve many layers in all three branches of government.

**Codify and Strengthen the "First Line" of Resolution – The Right to Appeal.** One of the most important recommendations NTU can make in this communication is that Members of the Subcommittee support a recently-introduced bill to improve transparency, accountability, and resolution of administrative matters between citizens and the IRS. HR 3220, the Preserving Taxpayers' Rights Act sponsored by Reps. Jason Smith (R-MO), Terri Sewell (D-AL), and a strong bipartisan list of cosponsors, contains some of the most comprehensive improvements to tax administration since RRA '98. First, it would codify the right of taxpayers to have their appeal heard by an independent and impartial IRS Office of Appeals to ensure there is a timely and efficient resolution to tax disputes between the agency and the taxpayer. Second, it narrows the scope for which kinds of cases can be designated for litigation by clarifying the limits of the agency's prerogatives. In fact, this power has never been authorized by Congress, but is an administrative power the IRS has developed institutionally.

Third, HR 3220 would limit the IRS's ability to issue designated summonses, a tactic which law-abiding individuals and businesses acting in good faith have increasingly encountered. Under the proposed law, this power could only be applied to taxpayers who are uncooperative and refuse to provide information or documents requested by the IRS. Finally, the language prohibits a growing, and unprecedented practice of the IRS outsourcing federal tax audits of citizens to third parties.

The provisions outlined in this bill represent a strong start toward restoring faith in the audit process and a more businesslike resolution environment between the IRS and the taxpayer. If adopted, the results will be lower IRS litigation costs, increased efficiency of agency resources and reduced uncertainty for taxpayers undergoing audits. It should be the foundation for further dispute resolution reforms.

**Expand ADR and Other Taxpayer Resolution Options.** Legislation introduced in the previous Congress, the Small Business Taxpayer Bill of Rights (HR 1828 authored by Rep. Mac Thornberry (R-TX)), provides a good starting point for discussion on how to jumpstart the utility of ADR in tax cases. The bill would allow a taxpayer to seek private, accredited mediation or arbitration from an "independent, neutral individual not employed by the Internal Revenue Service Office of Appeals." The taxpayer would under most circumstances share the cost of such a mediator.

The legislation would likely have to be augmented in other respects. Congress will need to either embed in statute or convince the IRS to widen the availability of ADR to campus cases, and should at least consider methods to limit the agency's prerogative to refuse mediation or arbitration.

Even if Congress finds this proposal wanting, a dedicated body of more neutral arbiters that taxpayers will come to respect is absolutely necessary for ADR to succeed. The NTA recommends a separate, distinct ADR branch housed at the IRS for such purposes. This is the minimum action that must be taken. Congress could direct the IRS to create this entity, with its own organic management and counsel as well as arbitration and mediation personnel. As a stronger alternative, Congress could give agency status to such an entity outside the IRS under Treasury, or even consider housing it at the Department of Justice. If Congress pursues the new tax agency structure outlined in the Better Way Blueprint, then the entity could serve as an adjunct to the proposed small claims court.

Other pieces of legislation introduced in the previous Congress contain numerous helpful augmentations to taxpayer rights. HR 1828 (114th Congress) would also:

- Strengthen safeguards against taxpayer abuses, such as a ban on ex parte communications between IRS case employees and appeals officers, and a prohibition on new issues being raised during a taxpayer's appeal process.
- Provide more avenues for redress when the IRS recklessly or intentionally disregards the law, including increases in the cap on damages and more options to recover attorney fees.
- Deliver additional opportunities for spousal relief, such as more time for filing petitions and clarifying that Tax Courts must follow applicable appellate procedures when reviewing such petitions.

Other reforms discussed in the Senate Finance Committee in the previous Congress merits the Subcommittee's attention. Among these was an amendment developed by Senators Grassley, Thune, and Cardin to tax identity theft legislation. Although it was authored prior to the PATH Act's codification of the Taxpayer Bill of Rights, the remainder of this amendment could still answer to many purposes under discussion in today's hearing. Highly desirable elements include clarified lien notice filing procedures, expedited "hardship" relief for businesses subjected to levies, and a new consultation requirement that will ensure that the IRS bureaucracy seeks early, systematic input from the Taxpayer Advocate before new regulations are published. Some of these concepts owe their genesis to Senator Grassley's bill from the 114th Congress, the Taxpayer Bill of Rights Enhancement Act (S.1578).

**Look Abroad for Advice.** Dispute resolution may seem to be an arcane matter to some, but across the world, it is a major underpinning of stability in tax administration systems. A March 2017 report from the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD) contained the results of a Forum on Tax Administration survey of tax authorities taken in January of this year. The results are enlightening.

The survey, drawn from 25 countries in the OECD, G20, and elsewhere, asked participants to rank 21 factors (on a scale of 1 to 5) that contribute "to tax uncertainty for business taxpayers in your country's tax system, regardless of whether or not the factors are within the control of the tax administration to influence." "Lengthy decision making of the courts, tribunals, or other relevant bodies" received the second-highest mean score among all 21 factors, with "Complexity in tax legislation" ranking first. Respondents were then asked to rank the importance of 25 various "tools to enhance tax uncertainty." Placing at #2 on the list (by media score) was "Effective domestic dispute resolution regimes," topped only by "Detailed guidance in tax regulations."

Of course, U.S. tax laws and their system of administration vary from those of other countries. Still, other nations have fine-tuned their dispute resolution systems to provide instructive guidance:

- Prior to a tax court case, Australian law subjects both the tax authority and the taxpayer to a mandatory requirement that they report on "genuine steps" taken to avoid litigation. As a result, ADR is more prominent in the dispute process.
- New Zealand's experience has received considerable evaluation from scholars there. In 2013 Melinda Jone at the University of Canterbury examined the country's tax dispute resolution structure, for which reforms such as mediation were being considered. In conducting both qualitative surveys and focus group interviews of practitioners, Jone and her colleague determined that "the most important aspect of the defined proposed regime is the inclusion of a mediator who is independent of both parties and moreover, that the mediator is foremost trained and qualified in mediation as opposed to being a specialist in tax law." Providing this as a cost-free service "should in turn enhance taxpayers' perceptions of fairness of the disputes procedures and therefore voluntary compliance."
- In 2011 Portugal initiated an ADR process for certain tax cases falling below prescribed amounts. If a given dispute meets those qualifications, revenue authorities are bound to engage in arbitration if the taxpayer requests it. An arbitration tribunal is empaneled that normally consists of the taxpayer's nominee, the government's nominee, and a third member agreed to by these two nominees. Qualification requirements for the nominees may apply in disputes of larger amounts, and generally arbitration results cannot be subject to another level of appeal.
- In the United Kingdom, Her Majesty's Revenue and Customs has been building experience with mediation-style ADR since making the option widely available in late 2013. Initial results have shown that roughly 4 in 5 cases for mediation among businesses were resolved; more than 4.5 million taxpayers in what are called "small and medium enterprises" are eligible for this form of ADR, and most have seen resolutions to their cases within 120 days. Considering that simply obtaining a hearing through the UK's First Tier Tax Tribunal entailed an average wait of nearly four times as long, this is a vast improvement. Even when ADR fails at its immediate task of a resolving a case, it can still perform a constructive purpose by sharpening issues under contention when they are litigated.*

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**A useful guide in regard to the UK's recent ADR procedure is entitled "Mediation of Tax Disputes" by Carl Islam Barrister, TEP, available at* http://newsite.carlislam.co.uk/wp-content/uploads/2016/02/Guide-to-the-mediation-of-tax-disputes.pdf.

Numerous other sources cited by the NTA and international mediation organizations can point to useful information on dispute resolution abroad. I do hope, however, that the Subcommittee will avail itself of an additional resource. National Taxpayers Union is a founding member of World Taxpayers Associations (www.worldtaxpayers.org), a global alliance of dozens of organizations dedicated to taxpayer rights. They possess a wealth of knowledge surrounding tax administration procedures in their own nations that could richly inform and supplement the testimony NTU is providing today. I would look forward to connecting Subcommittee members and staff in the coming weeks with WTA leaders for focused dialogue on issues of mutual interest.

**Look to States as Well.** For more than a decade, independent state tax tribunals have been gaining in popularity. In 2006, the American Bar Association (ABA) developed model state legislation ("Model Act") to serve as an alternative to traditional income tax dispute methods, which tended to fall into administrative appeals heard by the tax authority and litigation in courts. Today, such tribunals are commonplace. Although ABA's model act has some provisions that resemble existing federal implements, (such as the U.S. Tax Court), there are nuances worth exploring:

- While the U.S. Tax Court permits Enrolled Agents and CPAs to represent taxpayers in proceedings if they pass an exam, some state tax tribunals offer fewer such restrictions.
- The Model Act stipulates that the tribunal resides in the executive branch of government.
- Even though they do not operate as courts, tribunals are still established as separate and distinct entities from the tax agency.

In a familiar theme to discussing underutilization of ADR procedures the Internal Revenue Service has developed, the Tax Executives Institute (TEI) characterized its support for tax tribunals by stating, "The most important attribute of a tax tribunal is its independence. An impartial process for resolving tax disputes is a hallmark of both equitable tax administration and a competitive business environment."

NTU would urge the Subcommittee to further consult with ABA, TEI, and the Council on State Taxation for views on tribunals that could prove pertinent to the fashioning of federal legislation.

**Unlock the Courts for Changing Times.** At the 2017 International Conference on Taxpayer Rights, Professor Kristin Hickman presented on the issue of "Administrative Law's Growing Influence on U.S. Tax Administration." Her abstract pointed out that in the 2011 Mayo Foundation decision, the U.S. Supreme Court "declared its reluctance 'to carve out an approach to administrative review good for tax law only.' [This and other] cases … aim ultimately to require Treasury and the IRS to do a better of complying with APA [Administrative Procedure Act] requirements and explaining their actions at the time they undertake them – and thereby provide for greater transparency and accountability for Treasury and the IRS."

As this jurisprudence develops, now would be a good time for Congress to explore whether legislative affirmations of APA would be helpful in hastening this outcome, which could markedly improve the quality of information in many instances of judicial dispute resolution.

NTU would add that the availability of courts themselves for dispute resolution could be dramatically improved. Although the 1988 and 1998 taxpayer rights laws provided for certain exceptions, taxpayers still generally cannot enforce their rights in court until after they have been violated. Under Section 7421 of the Internal Revenue Code, no lawsuit can be brought by any person in any court for the purpose of restraining the assessment or collection of a tax, except under limited circumstances.

The case law around the Anti-Injunction Act further impedes the ability to restrain the collection of the tax. Injunctions can be granted where the failure to grant relief would result in irreparable damage to the taxpayer. But an injunction will only be allowed where it is clear that under no circumstances would the government prevail (or the taxpayer would not owe the tax). Moreover, the Declaratory Relief Act, which allows citizens to file a suit that can persuade a court to declare their rights, indicates that the law applies "except with respect to federal taxes." The Federal Tort Claims Act presents additional barriers to tax-related controversies.

Congress should give serious consideration to providing citizens with the limited ability to stop the IRS from violating their rights through litigation. Doing so will involve some level of controversy, and will no doubt prompt lengthy deliberation. A passage from NTU testimony before Congress in 1995 indicates a solid starting point, which is by amending the Anti-Injunction Act:

> Taxpayers should be allowed to file suit in a federal district court to enjoin the IRS from enforcement action because: the deficiency assessment was made without knowledge of the taxpayer and without benefit of the appeal procedures provided by law; there has been an improper or illegal assessment; there has been an action in violation of the law or tax laws or regulations providing for procedural safeguards for taxpayers; the IRS has made an unlawful determination that collection of the tax was in jeopardy; the value of seized property is out of proportion to the amount of the liability if other collection remedies are available; or the IRS will not release the seized property upon an offer of payment of the U.S. interest in the property.

**Increase Representation Options.** Though first partially funded by the federal government through RRA '98, Low-Income Taxpayer Clinics (LTCs) have their roots in remarkably successful pro bono and nonprofit programs established decades before then. Prior to her position as NTA, Nina Olson was associated with the Virginia-based Community Tax Law Project. In remarks to this Subcommittee on September 26, 1997, she wrote:

> Our clients have cases involving complex issues, such as investment tax credits and depreciation deductions claimed by rural farmers; the taxable nature of severance pay received by a Navy pilot in combat status at the time of retirement from service; and the taxable nature of a payment received in the settlement of a complicated suit alleging anti-trust violations … Other cases involve the responsible person penalty (IRS 6672) and employee classification issues.

Today, the income eligibility thresholds for LITC assistance are set at 250 percent of poverty level (e.g., $61,500 for a family of four). This is helpful for working-class, some middle-class, and a limited number of small business owners. Should Congress follow the IRS reorganization proposal called for in the Better Way Blueprint, access to administrative, quasi-judicial, and legal remedies should be more affordable than it is today.

Nonetheless, Congress should remain sensitive to the needs of taxpayers who fear their capacity to assert their rights is limited by lack of representation. The Social Security Administration provides Administrative Law Judge services at no charge to participants in ADR procedures. Taxpayers face more complicated circumstances, as Olson's account above amply demonstrates. Short of providing a "public defender" office for taxpayers – likely the costliest policy option – Congress could simply recognize the valuable contribution of the current nonprofit LITCs and their volunteers. Raising the eligibility threshold (and concomitant funds) to 300% or 350% of poverty level would begin opening up assistance to more small business taxpayers in particular. Although Congress could employ a different measure of eligibility, such as size of tax dispute or AGI on the tax return in question, each carries with it pros and cons.

**Beware of "Scoring" Traps.** One technical aspect the Subcommittee is no doubt considering has to do with the "revenue loss" of any taxpayer rights provisions. While such a concern can be valid, NTU would caution that many revenue estimates are highly dependent upon changes in behavior that are more complex to model than they would seem. Without wading into the static versus dynamic scoring debate, it is often easier to assume that collections will be dramatically impacted when restricting the tax agency's powers. Yet this has not necessarily proven true.

The National Commission on Restructuring the IRS found "no evidence that the rights to redress" under the 1988 and 1996 taxpayer rights laws "have caused significant disruption to IRS collection efforts." The Commission's report determined that the cost of providing reimbursement for representation fees under those laws was $5 million, rather than the $100 million originally estimated. In the final analysis, even if the "cost" turned out to be $50 million, or $100 million, the central question here is whether justice is being more effectively served. This is generally what policymakers ask when it comes to other issues of access to the legal system.

Furthermore, even from a cold, hard dollars-and-cents perspective, the *net* rather than the gross impact on revenue must be taken into account. For example, the very existence of dispute resolution mechanisms can have an additional, quantifiable fiscal benefit – better voluntary compliance. During a September 25, 1991 hearing before this Subcommittee, Ernest J. Dronenburg, then Vice Chairman of California's State Board of Equalization, provided an illustration of this point that is still potent today:

> Many tax administrators initially viewed taxpayer bills of rights with skepticism and apprehension. However, others immediately saw the Taxpayers' Bill of Rights as a 'two-fer.' By that, I mean it changes the attitudes about tax administration and the tax system, and it also sends an emphatic message to tax agency personnel that we are going to be doing business differently. Both of these changes create better compliance within the system and reduce the number of people who drop out of the system because they are afraid or unsure of it. …For example, a .5% increase in voluntary compliance resulting from taxpayer education and changing attitudes would increase revenue in my state by over $400 million annually. Conversely, doubling our current audit coverage from 3% to 6% would produce less than half that amount.

National Taxpayer Advocate Nina Olson has since expressed Dronenburg's point in other terms, but Dronenburg's contention that such procedures "make tax agencies more approachable, and encourage working relationships to solve problems" remains convincing to us.

In some instances, data does exist to help monetize the potential of administrative reforms. As the NTA reported, the Air Force's 17-year-old "ADR First" policy with contractor claims has saved the service $275 million, while case resolution times have dropped an average of 80 percent. Resolving issues through ADR typically costs EPA staff less than half the hours they would expend in traditional adversarial resolution proceedings. These experiences, as well as those from other governments and the private sector, ought to be incorporated into any cost projections for expanding ADR that the Joint Committee on Taxation and the Congressional Budget Office may attempt to calculate.

**Maintain Oversight of the System – Even Without an Oversight Board.** Few elements of RRA '98 were more sweeping and crucial to transforming the tax agency than the IRS Oversight Board – and few have been more difficult to preserve. In August 2013, William Hoffman of *Tax Notes* interviewed many of the principal actors in the passage of RRA '98. According to Russell Sullivan, who served as Senator Bob Graham's (D-FL) tax counsel during the evolution of the bill, "The biggest failure in the legislation [was] the Oversight Board. … [It] should have been the principal entity for giving impetus for the IRS to develop streamlined procedures from a tax administration standpoint and informing Congress to the extent that that's not happening, so Congress could act…" Senator Charles Grassley (R-IA) contended the Board has "been more of a tool for Treasury and the IRS to get what they want – and mostly more money – as opposed to zeroing in on abuse of taxpayers by the IRS."

Many causes have been given for the Oversight Board's apparent shortcomings in meeting the intent of RRA '98, including members who only served part-time and controversies over policing problems with the IRS's nonprofit division and with the Affordable Care Act. Both the White House and the Better Way Blueprint call for abolishing the Board. Nonetheless, NTU would caution the Subcommittee not to overlook the role that an oversight body outside the IRS and Treasury could have in ensuring that progress is made on future dispute resolution policies.

During our service with the IRS Restructuring Commission, it was evident to NTU that future legislation aimed at affecting the culture of the tax agency could not succeed without consistent guidance from a non-IRS entity. This was by no means a universally-held view. Five Commissioners dissented from the Commission's Oversight Board proposal, three of whom praised instead Treasury's efforts to institutionalize oversight with a Management Board consisting of public officials, as well as an IRS customer service task force (again comprised of government officials and employees).

The majority of Commissioners' intent, however, was to provide the "focus, expertise, and continuity that will be necessary for the IRS to meet the legitimate expectations of the American public" through an Oversight Board. That intent largely carried through to RRA '98, but struggled for recognition. The Clinton Administration did not send any Board nominations to the Senate for 18 months.

More than 15 years after that incident, the IRS Oversight Board lacks a quorum, for which there are practical consequences. The IRS's strategic plan receives less emphasis and monitoring from professionals with years of experience in successful business transformations. Information technology issues such as identity theft do not receive as robust a benefit from private sector expertise in developing comprehensive solutions. Furthermore, another source of innovative budgeting practices, again backed by private sector experience, is denied the IRS. Taxpayers ultimately suffer the most from this loss.

Congress could pursue several alternatives to the current Oversight Board. One is to work with the Administration to identify more full-time nominees and staff who can devote additional hours to the Oversight Board's mission. That mission could be further clarified so as to distinguish it from Treasury and IRS Advisory Groups as well as the National Taxpayer Advocate and Treasury Inspector General for Tax Administration. The Board could focus on providing practical private-sector guidance to the IRS on meeting the goals of its strategic plan and embracing innovation (such as ADR techniques). Further, the Board could analyze data and feedback from other bodies such as the Taxpayer Advocacy Panels to provide direct, ongoing input to Congress on legislative responses to some of the most pressing tax administration issues.

Congress could instead consider creating a new entity whose function is to coordinate inputs from various sources and hold IRS leadership publicly accountable for progress on taxpayer rights. During a July 18, 1991 hearing of this Subcommittee, HR 2472 (102nd Congress) was mentioned as a way of creating a "monitoring group" that would have consisted of two appointees from the House's oversight Subcommittee, two from Senate's equivalent, two from private life, and two from the IRS Commissioner. The group was to receive information on taxpayer rights issues and ensure that the IRS Commissioner annually reported on means of resolving them. Perhaps this structure could be modified (to include the National Taxpayer Advocate in place of one of the Commissioner's nominees) to fit current needs.

Another possible approach was brought to the attention of the Restructuring Commission during its Omaha, Nebraska field hearing on April 4, 1997. During those proceedings, Samuel Walker, a Professor of Criminal Justice at the University of Nebraska-Omaha, offered a proposal for an IRS citizen review board. This office, modeled after citizen review and complaint entities established in many cities for police departments, would not be charged with resolving tax administration problems (the mission of the National Taxpayer Advocate) or allegations of criminal behavior (investigated through the Inspector

General or the Department of Justice). Rather, it would hear taxpayer concerns over specific instances of mistreatment by IRS personnel and make recommendations for disciplinary action.

Walker outlined a structure whereby an External Independent Complaint Auditor, appointed in consultation with Congress, would oversee an Internal Office of Citizen Complaints to receive specific reports from citizens and, summarize annually any changes to personnel procedures that might help to minimize incidents and complaints in the future. The Restructuring Commission's final report proposed, instead, that the IRS should "centralize the cataloging and review of taxpayer complaints of IRS misconduct on an individual employee basis." This advice, subsequently embedded in RRA '98, has failed to provide a more formalized grievance procedure which, along with regular reporting on personnel remedies that a citizen review board can provide, could result in more productive resolution of disciplinary problems among tax agency employees.

Congress could request a study from the National Taxpayer Advocate to evaluate the experiences of city police department complaint entities since 1997, and explore the suitability of updating Walker's proposal to current circumstances with the tax agency.

**Simplicity Is the Best Form of "Resolution."** Finally, I would be remiss in failing to mention the single most effective method of resolving taxpayer disputes: avoiding them in the first place. Tax simplification can play a major role in this regard. When citizens and tax professionals can understand the laws more clearly, resolution procedures can function more properly as tools of last resort. How can such simplification become habitual?

NTU can offer numerous perspectives in fostering this consultation, but two suggestions come foremost to mind. Section 4022 (a) of RRA '98 required the IRS to produce an annual report to Congress on "sources of complexity in the administration of the federal tax laws."

The provision was successful, even though IRS compliance with it was limited. According to the National Taxpayer Advocate, the tax agency has issued just two annual reports compliant with the 1998 statute, but in both instances, "Congress adopted legislation to address each area of complexity referenced in the reports, and the IRS addressed the administrative problems they uncovered. Thus, the IRS's decision to discontinue the reports has likely contributed to tax complexity." The last report was published in 2002; Congress should order resumption of the annual reports now, so that a 2018 document can be readied.

NTU also concurs with the Taxpayer Advocate's recommendation that "the IRS establish a process to automatically provide the tax writing committee staff with a list of specific front-line technical experts who can discuss the administrability of pending (or existing) legislation directly with the tax-writing committees," as provided in Section 4021 of RRA '98. The most important results would be in budgetary savings to the IRS and reduced private-sector compliance costs – a win-win situation for taxpayers.

Regardless of the direction comprehensive tax reform may take in 2017, the need for a regular review of the tax laws with an eye toward clearing away unnecessary, conflicting, or cumbersome provisions will always be extant. NTU's staff recalls vividly from field hearings and other submissions to the Commission that many members of the private-sector tax community were willing to volunteer substantial time and energy to make suggestions for simplification. A panel, meeting once every four years, would harness this volunteer activity.

There are several models for a process such as this, among them creation of an executive branch body (e.g., via the Federal Advisory Committee Act). It's mission: to evaluate Title 26 of the U.S. Code and Title 26 of the Code of Federal Regulations in order to methodically identify specific opportunities for simplification, clarification, and repeal of provisions that are complex, contradictory, difficult to administer, or outdated, and provide actionable recommendations that the Executive and Legislative Branches can implement in expedited fashion.

Members would include individual taxpayers, business taxpayers, tax practitioners, tax attorneys, academics, and former public officials with an expertise in tax administration (subject to federal employment rules). The Commission's management could be drawn from the National Taxpayer Advocate's Office or the Treasury Inspector General for Tax Administration. Participation and consultation of Congressional staff would be invited and encouraged. The Commission's report could be partitioned according to those requiring legislative action and those necessitating executive action. In order to precipitate such action, the legislative portion could be required by law to be received by the tax-writing committees and brought to the floor under privileged consideration. The executive portion could be automatically referred to the rulemaking process under APA.

The preceding outline would require additional details. NTU is ready and willing to assist in developing the charter for this Commission.

## Conclusion

Just one week ago, the House of Representatives unanimously enacted HR 1843, the Clyde-Hirsch-Sowers RESPECT Act. This was an emblematic bipartisan moment for which Members of this Subcommittee deserve great praise, and for which taxpayers are most grateful. It is also a fitting tribute to the title of today's hearing. This legislation brought a much-needed resolution to a policy that had created ongoing taxpayer disputes with the IRS over its excessive, often abusive exercise of asset forfeiture powers.

Congress's statutory remedy, in the form of HR 1843, arrived about three years after many of the IRS's so-called "structuring" investigations made national headlines. Unfortunately, the agency had been engaged, along with the Justice Department, in these acts for a number of years prior.

NTU raises this point to encourage the Subcommittee in reaching bipartisan consensus on the plethora of taxpayer rights and remedies issues that have arisen since the IRS Restructuring and Reform Act. With HR 3220, for example, leading Democrats and Republicans on the Subcommittee and the full Committee have come together to address the right to appeal in a meaningful fashion. Other opportunities for such cooperation abound with your colleagues in the House and Senate. Indeed, the history of this movement for sensible progress on taxpayer rights has been written by Members of both parties, among them Bob Kerrey (D-NE), Rob Portman (R-OH), Chuck Grassley (R-IA), David Pryor (D-AR), Harry Reid (D-NV), and Bill Archer (R-TX).

Tax reform and simplification are integral parts of a long-lasting framework for taxpayer rights. Whatever shape these may take, the Members of this Subcommittee can build administrative foundations that will ensure the current and future tax system functions efficiently, effectively, and respectfully. Accordingly, NTU welcomes the leadership that each of you can provide at this critical moment.

I am most grateful to all of you for engaging in this hearing and for devoting so much attention to these lengthy remarks.