

REPORT #912

TAX SECTION

New York State Bar Association

Report on the National Commission on  
Restructuring the Internal Revenue Service

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## TAX SECTION

# New York State Bar Association

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August 13, 1997

The Honorable J. Robert Kerrey  
 Co-Chair  
 National Commission on Restructuring  
 the Internal Revenue Service  
 United States Senate  
 Washington D.C. 20510-2704

RE: Report of the National Commission on  
 Restructuring the Internal Revenue  
 Service

Dear Senator Kerrey:

The Tax Section of the New York State Bar Association has reviewed the report of the National Commission on Restructuring the Internal Revenue Service and discussed its proposals<sup>1</sup>. We commend the Commission for its probing analysis of this important series of issues. There is no question that the work of the IRS, and its relationship with the tax-paying public, is a vital function of the Federal Government. The Commission's Report should stimulate a worthwhile debate on methods for improving the service provided by the IRS.

<sup>1</sup> Since the Tax Section's consideration of the Commission's Report, the IRS Restructuring and Reform Act of 1997 was introduced. We have reviewed that Bill and do not believe it would materially affect the views expressed herein.

### FORMER CHAIRS OF SECTION

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As tax professionals, we work with the Treasury and the IRS on a continuing basis, both in respect of professional responsibilities for clients, as well as serving as representatives of the Tax Section which has for years provided non-partisan technical assistance to government personnel on matters of tax policy, interpretation and administration. We recognize that IRS personnel are faced with a most difficult task, i.e., collecting the overwhelming portion of government revenues from taxpayers who frequently resist paying, because they sincerely disagree as to their legal obligation to do so, because they willfully disobey the rules or because they lack the money to do so. Hence, the IRS and its personnel will never enjoy universal popularity. Moreover, as more fully described below, it is virtually impossible for the IRS to function in a timely and completely effective fashion in the face of constant legislative changes bringing increasing complexity to the Internal Revenue Code. While we have found IRS personnel generally to be thoughtful and cooperative, we recognize that this is not always the case, but we regard that to be inevitable given the size of the operation and the essentially coercive nature of its task. We also recognize that the modernization of the IRS through better use of technology has not been successfully implemented. Hence, while we do not think the IRS is primarily a "service" agency, there is no question that steps can be taken to improve performance of its tax administration and enforcement functions, and the manner in which it deals with the public.

We are not management consultants, and, as a consequence, we do not have significant comments on sections of the Report dealing with the culture of, and incentives for, IRS personnel, the efficiency and modernization of electronic filing, or computerization of the IRS. While we have not involved ourselves in issues relating to funding, we believe that more widespread audits and, as a result, more even-handed enforcement of the law would increase taxpayer respect for the IRS and for the tax law in general. We are confident that several of the

commission's proposals could achieve significant benefits in these areas.

We do, however, have sufficient experience on technical and tax policy matters to comment on the efficacy of certain of the proposals contained in the report. In summary, we believe that the law's complexity and the frequent legislative changes to it are at the heart of the IRS difficulties, and, while we support the proposals made by the Commission in support of simplification, we would urge an even greater effort to this end on the part of the Treasury Department and the Congress. Second, we are concerned, for the reasons set forth below, that the introduction of a Board of Directors into the management structure of the IRS will make it less able to perform its difficult role as a government agency.

## I

We believe the Commission should be applauded for its clear and unequivocal conclusions found in Section 6 of the Report-Tax Law Simplification. We agree that there is a "clear connection between the complexity of the Internal Revenue Code and the difficulty of tax law administration and taxpayer frustration". (Report at page 35). In fact, we believe that this is a principal reason for the perceived failures of the IRS, and the consequent taxpayer frustrations. If anything, the Report has failed to draw an even closer connection between this issue, and the perceived failures of the IRS. Unless steps are taken to address the issues raised by this Section 6, all of the other changes recommended by the Commission will be ineffective, since a newly restructured IRS will continue to have to confront the complexities engendered by the legislative process and the "frequency [and complexity] with which Congress and the President change the tax law", (Report at page 35). For example, we note with dismay the headlines in the "Tax Report" column of the Wall Street Journal on July 30<sup>th</sup>: "Mind-numbing complexity of the budget pact is good news for

tax advisers" and in the New York Times on Sunday, August 2<sup>nd</sup>: "Professionals Will Profit From Bill's Mind-Numbing Complexity."

Certainly, the "Tax Complexity Analysis", or a similar process, would be a start. Even a cursory review of the two bills recently considered by the conference of the House and Senate would demonstrate the need for such an approach. For example, a Tax Complexity Analysis would have certainly pointed out that the various child related credit provisions found in both House and Senate versions of the Tax Reconciliation Bill and the indexation provisions of the House bill would add wholly new concepts of great complexity to the Code.

But we have a concern with the process for implementing this Analysis. Tax policy cannot be separated from tax administration, and it is impossible to vest sole responsibility for tax policy in the Treasury Department (as the Report suggests) and yet call for an "uncensored view" on administrability from the IRS. The Commission's Report does not adequately address the inherent inconsistency of calling for independent views from an IRS, governed by a board of directors independent of the Treasury Department, while leaving Treasury, and a presumably subordinate IRS, with its traditional responsibility for tax policy and the expression of the views of the Executive Branch on tax legislation. We believe that seeking more than one government view on issues relating to proposals for tax legislation will undoubtedly confuse the legislative process, diffuse accountability and lead to a less coherent statute. While the proposal for administrability to be considered for each significant piece of tax legislation is an excellent suggestion, in our view it would be far better to mandate that this analysis be undertaken as an element of the tax policy function of the Executive Branch. This analysis should include consideration of the new forms (and accompanying instructions) and the additional taxpayer record keeping which will be needed to implement any proposed

changes in the Code. Treasury should continue to be obliged to consult with the IRS on legislative matters as part of undertaking this analysis, and to incorporate, in the Department's comments and recommendations to the Congress with respect to the legislation, the IRS' views (subject to the Treasury's modifications where appropriate) on the effect of proposals on simplification. Moreover, a similar process should be established for legislative proposals arising in Congress. But the tax policy function, including issues of administrability, should always be the province of one Executive Branch agency only.

## II

We are also troubled by the introduction into the governance of the IRS of a board of directors principally consisting of persons from the private sector with management experience. This board of directors is to have a small staff. It is supposed to play a role neither in management of the IRS nor in the making of tax policy, but it is to have power to appoint the Commissioner and the Chief Counsel and to play a role in other senior staff appointments. Its members, in turn, are to serve at the pleasure of the President. The two government representatives are from the Treasury and from the employees' union.

It is extremely difficult for us to see how the IRS and the Treasury could carry out their traditional functions under this kind of arrangement. Either the board of directors has power, in which event it--and its staff--will represent a major intrusion into the decision-making functions of the IRS, or it seems to serve very little purpose except to confuse lines of authority. If it does play a role in the functioning of the IRS, we do not see how that role will not encompass issues of administration and policy. For example, the budget necessarily involves decisions as to how the law is to be enforced, which, in turn, implies policy decisions as to what is important to the enforcement of the law. In the case

of the Internal Revenue Service, we think that the allocation of funds in the budget and the management of the Service are inexorably linked, and that both influence, and are influenced by, issues of tax policy.

Similarly, the board's influence on personnel decisions necessarily will require it to pass on the job performance of various employees of the Service, and obviously those employees will look to the board, and its staff, for guidance as to how to perform their functions so as to merit approval by the board. Under the circumstances, it seems to us that authority over the IRS, which has historically been vested in the Commissioner, who in turn reports to the Secretary of the Treasury, will now become bifurcated. Furthermore, it is difficult for us to see how the board, acting as a board and performing its services on a part-time basis, can exercise this authority from its own knowledge and experience. Consequently, we would anticipate that either the board would look to its own staff for guidance or would rely on the Commissioner and the Chief Counsel for guidance; not only do we think that if the former turns out to be the case, there will be uncertainty within the IRS as to who is in charge, but it is quite likely to engender significant conflict between those who are officially designated to manage the IRS and the staff of the board.

We note that others have also expressed deep reservations about the board of directors on grounds of conflict of interest, confidentiality, accountability and other issues. While this letter has not focused on those problems, we believe many of those concerns are justified. In particular, we have a serious concern that the public's perception of the impartiality and non-partisanship of the IRS may be compromised by the fact that the majority of the boards of directors are from the private sector. However, our greatest concern is that the impact of the board will be to make the IRS less, rather than more, effective in carrying out its difficult mandate.

We are under the impression that in suggesting a board of directors for the IRS, the Commission was influenced by the role that such a board plays in corporate governance throughout the United States, including the role played by the board of directors in operations such as the Post Office. However, we do not think that one can constructively treat the functions of the IRS as parallel to those of an ordinary corporation or even the Post Office. The purpose of such entities is relatively clear, i.e., to realize a profit by selling goods and services, which are in turn produced as efficiently as possible. Conflicts between long-term goals and short term benefits may arise, but the decision to be taken is always made in the context of the long-term profitability of the enterprise. If it is successful, it attracts customers, and, if it is unsuccessful, the customers go away. The Service, in contrast, does not lose its customers, whether they are happy with it or not. The Service's principal job is to collect the revenue needed by the government to function, and, as noted above, it is given extensive enforcement powers to accomplish this (since taxes are not voluntary contributions). Nevertheless, it is incumbent upon the Service to perform its primary function in a way that does not anger the public, both because our tax system depends on voluntary compliance and because, in the end, it must be politically acceptable to the majority of the people. This conflict, between the need for popular support of the Service and the need for it to enforce the law, requires a unique combination of efficiency and understanding, and this makes management of the Service a daunting task. No other agency of the government comes in such constant contact with the people of this country. Given the vital nature of the role of the Service and the complexity of its task, we doubt very much that the introduction into the system of a board of directors made up of part-time managers with limited experience in the tax law is going to help the Service reach its conflicting goals.



An identical letter is being sent to those on the attached list.

Very truly yours,

Richard O. Loengard, Jr.  
Chair

The Honorable Rob Portman  
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National Commission on Restructuring  
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Washington, D.C. 20515

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Committee on Finance  
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The Honorable Daniel P. Moynihan  
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The Honorable David R. Obey  
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