

NTA Keynote Address: American Bar Association Tax Section, May 5, 2006

Thank you for inviting me today – I am honored to be here, before so many of my friends and colleagues, for whom I have the deepest admiration and respect. In fact, it feels almost a little too bold to think that I might have anything to say that someone in this room has not thought of before, and more coherently than I. However, as someone who despite self-doubt churns out 600-page reports to Congress each year, I will just plow ahead with my remarks anyway. It goes without saying that these remarks do not necessarily reflect the views of Treasury or the IRS. They do, however, reflect the views – the ruminations, if you will – of the National Taxpayer Advocate.

I believe that there exists a social contract between the taxpayer and the tax system, that if taxpayers come in voluntarily and report and pay their duly owed taxes, the government will provide the services and oversight necessary to ensure that taxpayers can, and do, comply with their tax obligations. Yes, I know everyone shakes their heads when I say the tax system is “voluntary,” particularly since about 85 percent of tax returns include a W-2, which reports income on which taxes are withheld. But think about it – in the W-2 situation, the vast majority of employers are voluntarily reporting and withholding taxes. The vast majority of employees are claiming withholding allowances sufficient to produce refunds rather than tax liabilities – liabilities that would ultimately require the IRS to go out and collect. To me, employer and taxpayer compliance with the withholding requirement demonstrates the voluntary nature of the tax system.

What is it about U.S. taxpayers that make the vast majority voluntarily comply without the IRS holding a gun to their heads? Well, I think the vast majority of U.S. taxpayers understand and accept the rule of law. They may complain about paying taxes, or the amount of taxes, but they understand that if they are required to pay that amount, they should, and they do. The IRS Oversight Board survey illustrates this point: When taxpayers are asked why they comply with the tax laws, the top reason – given by 82 percent of respondents – was a sense of personal integrity. That is, taxpayers don't want to think of themselves as "tax cheats."

Of course, taxpayers don't want to think of themselves as "tax chumps," either. They can be tax chumps in two ways. The "Type 1 Tax Chump" is often remarked upon – it relates to the tax gap. That is, taxpayers who dutifully pay their taxes – for example, wage-earners – are "chumps" because they are paying, and paying, and paying, and others – those in the cash economy – are not. But the second way a taxpayer is a chump is if that taxpayer keeps paying and paying and paying and gets nothing – or very little – in the way of taxpayer service and assistance from the very government he or she is funding! This person is my "Type 2 Tax Chump." He pays but does not get his money's worth within the tax system.

In the United States, taxes are the lifeblood of government. Taxes are the means that enable the U.S. government to act and pay for its activities. Now, we can argue about the proper size of government and the proper level and distribution of taxation.

But my point here is that government is us, and taxes are us. [My new slogan – “Taxes-R-Us”]

It is precisely this identity between the government and its taxpayers -- and the incredible act of trust, and faith, that taxpayers make when they voluntarily file their tax returns -- that places a heavy responsibility on the U.S. government and the IRS. What is that responsibility? It is to honor the social contract and provide the requisite services and assistance and oversight so that taxpayers do not feel like fools because they followed their essentially decent natures and complied with the tax laws.

I believe that the goal of a fair and just tax system must be that it does everything it can to promote voluntary compliance. Why voluntary compliance and not just any old compliance? Because helping taxpayers voluntarily comply honors the social contract that is the foundation of our federal tax system. Because voluntary compliance affirms the taxpayer’s sense of belonging to the civic whole rather than placing the taxpayer at odds with that polity. Because voluntary compliance creates taxpayers who are willing to work with the tax system rather than taxpayers who hide from the tax system. Because voluntary compliance is, in the long run, the most cost effective way to achieve lasting compliance.

Approximately 83.7 percent of the tax dollars known to be due and owing – with emphasis on “known” – are voluntarily paid to the IRS. That figure is an IRS

success, in and of itself. Now, what can we do to encourage – or “nudge,” if you will – the taxpayers who owe the remaining 16.3 percent of the tax dollars? Obviously, some taxpayers won’t comply unless they are “helped” in some way, and one of those methods of “helping” may have to involve IRS enforcement actions. IRS enforcement actions help reassure taxpayers they are not Type 1 Tax Chumps. That is, if their neighbor is actively cheating on his or her taxes, taxpayers want to know that the IRS will find that neighbor and make sure the neighbor complies.

The IRS enforcement presence also makes generally compliant taxpayers slightly “nervous” about fudging on their taxes. Yet, although it may be helpful to overall compliance rates to have “nervous” taxpayers, we don’t want intimidated taxpayers. That is, when taxpayers have a problem or a question, we want them to call the IRS so they do not make mistakes and join the ranks of noncompliant taxpayers. Every time a taxpayer calls the IRS or visits a taxpayer assistance center, the resulting interaction gives the IRS an opportunity to help that taxpayer comply with the tax laws. Why on earth would we try to minimize these opportunities and not make positive use of them when they occur? These are our taxpayers – the people who pay the government’s bills!

To achieve voluntary compliance, we must not define taxpayer service solely as the traditional categories of notice and guidance clarity, tax law assistance, account resolution, even tax preparation. We must adopt a broader application of taxpayer service, and offer it within our enforcement activities. This is so, because the causes

of noncompliance are legion. Noncompliance can be attributable to tax law or procedural complexity or confusion. It can be attributable to catastrophic events in the taxpayer's life. It can be attributable to the advice provided by the preparer or other professional. And it can be attributable, in some instances, to reckless disregard of the law or criminal intent.

In all but the last category, it seems to me that there is a role for taxpayer service within the enforcement contact. The IRS employee should listen with a keen ear to what the taxpayer is saying, to see if there is an opportunity to educate the taxpayer about how to avoid repeating the problem, even as we rectify the current one. I know this is a difficult thing to ask of our enforcement employees, because day after day they deal with taxpayers who appear to be noncompliant, but if we approach taxpayers as if they were guilty, if we assume that the only explanation for their behavior is intentional noncompliance, if we look at a collection case or an examination not as an interaction between a taxpayer and his government but instead as just another case that needs to be closed within a set cycle time --- well, we will most assuredly get the behavior from the taxpayer that we expected to see. Our negative expectations will be fulfilled. And both parties will have breached the social contract. How sad for our system.

The Offer in Compromise program is an example of a program that incorporates enforcement and taxpayer service components. By definition, only noncompliant taxpayers submit offers, since these taxpayers are asking to pay less than the

amount that the IRS has determined to be due and owing. Now, in the short run it may appear expensive to process and review an Offer in Compromise, and it may appear that the government is writing off revenue – making other taxpayers feel like Type 1 Tax Chumps.

On the other hand, over the long run, the taxpayer who submitted the offer may pay more tax dollars into the system as a result of his promise – required with every accepted offer -- to be fully compliant for the five succeeding years, or else face reinstatement of the tax debt. Now, five years is a long enough period to enable this taxpayer to learn a new norm of behavior – namely, compliance. And when you compare the 16 cents on the dollar that IRS receives from offers, to the virtually no cents it collects after year 3 of the 10-year collection period, many compliant taxpayers might feel that the IRS, by not promoting an efficient and cost effective offer program, is treating them like Type 2 Tax Chumps!

Type 2 Tax Chumpness – where the taxpayer pays his taxes and receives in return only that assistance and service that the government is willing to give and not what the taxpayer needs to be compliant – is present where tax administration abandons its responsibilities for providing core services to the taxpayer and cedes the field to third parties to do so. Thus, today we have the commodification of tax preparation, as evidenced by the IRS establishing a goal of reducing the number of returns it prepares in its walk-in sites by 20 percent a year, and as evidenced by the reduction of the dollar level of support per Volunteer Income Tax Assistance site, even as

these VITA volunteers must meet ever more stringent procedural requirements; and as evidenced by the IRS opposition to regulation of unenrolled return preparers – pawn shops and check cashing places and used car dealers – even as it imposes a registration and test requirement on VITA volunteers; and as evidenced by the government walking away from its responsibility to provide taxpayers with a free electronic analog to paper tax forms and a free method of filing those electronic tax forms directly with the IRS. The IRS has essentially ceded the field of tax preparation to the private sector, placed no requirements on private sector preparers for minimum competency, and allowed preparers to offer all sorts of non-tax-related goods and services in the context of return preparation. How can this state of affairs be good for the tax system or for taxpayers?

Which brings me to section 7216, the code section that provides for criminal sanctions when any person “engaged in the business of preparing, or providing services in connection with” income tax return preparation either knowingly or recklessly discloses any information furnished to him for or in connection with the preparation of the return, or uses any of this information for any purpose other than return preparation. The IRS is proposing to update the existing section 7216 regulations because they were promulgated in 1974 and therefore do not provide adequate guidance for today’s electronic filing environment.

Now, the protection of taxpayer information by the IRS and preparers is an absolute necessity for maintaining taxpayers’ confidence and their willingness to uphold their

end of the social contract. As the National Taxpayer Advocate, I yield to no one in my concern for such protections and my concern that taxpayers might be exploited in the context of commercial return preparation. In fact, it was precisely these concerns – about current business practices that I view as questionable and in some cases unacceptable – that led me to be a strong advocate for changing the existing regulations.

From a consumer protection standpoint, the worst outcome in my view would be to maintain the *status quo*. Neither the statute nor the current section 7216 regulations provide definitions of the two key terms – use and disclose -- so in many ways, the field today is wide open for return preparers to decide for themselves what constitutes a disclosure or use.

Under the current regulations, a tax return preparer, with taxpayer consent, may use tax return information to promote nontax products and services currently offered by the tax return preparer or a member of the tax return preparer's affiliated group. Moreover, with taxpayer consent, tax return preparers can disclose (and even sell) tax return information to anyone. The regulations impose no limitations on this disclosure. And once this tax return information is disclosed to a third party, there are no limitations in the tax code on that third party's ability to re-disclose the tax return information. The taxpayer will never know how or when or to whom his information is re-disclosed.

The distinction between “use” and “disclosure” is significant. In the “use” environment, the tax return preparer herself is holding onto information she already has and is using it to evaluate the appropriateness of a product or service for the taxpayer’s situation. The taxpayer has agreed to the preparer’s use -- but not disclosure -- of the data, and if the preparer uses the data in a manner that the taxpayer has not agreed to, the preparer may be subject to civil and criminal sanctions. In the “disclosure” environment, on the other hand, the tax return preparer can be sending tax return information out to any third person on the open market, where the tax return information can be used in any manner whatsoever, without limitation. There is no way that the taxpayer can know in advance how and by whom his tax return information will be used once it is disclosed. Criminal sanctions apply only if the preparer “knowingly or recklessly” discloses information without the taxpayer’s consent. Such sanctions do not apply to non-preparers.

We can all imagine how these two provisions – disclosure and use – can be abused and how they can impair tax administration and compliance. In fact, the statute and current regulation are written so that disclosure and use of such information by a tax return preparer is prohibited except in a few instances. One of those instances, under the existing regulation, is pursuant to the consent of the taxpayer.

In drafting the proposed regulations and a related draft revenue procedure, the IRS, Treasury, and I wrestled with many competing concerns and points of view, both within and without the IRS. Ultimately, we agreed to focus on provisions designed to

ensure that taxpayers gave informed consent – that is, they are clearly informed about what they are being asked to agree to, including the scope, term, and limitations of that agreement. These provisions are very specific, as I described in my testimony before the Senate Finance Committee last month.

Now, we could decide not to allow the taxpayer to consent to use or disclosure under any circumstances. I must confess that there is some attractiveness to this proposal – it is certainly pure. But in the back of my mind, I keep wondering if there aren't instances, related to tax return preparation, where use or disclosure might be warranted and even necessary. It is my personal opinion that taxpayer consent to use or disclosure of tax preparation information should be limited to only those instances where it is necessary for tax-related purposes. I believe the regulations should define what purposes are "tax-related." I do not believe that releasing tax return information for purposes of obtaining a Refund Anticipation Loan – or RAL – is "tax-related." I do not believe that releasing tax return information to a bank – whether affiliated or unaffiliated with the preparer – in order to obtain an IRA or other retirement account is "tax-related." In the first instance, the government – as part of its social contract with the taxpayer – should provide a method for taxpayers, including the unbanked, to receive the refund of their hard-earned dollars quickly and without charge. In the second instance, the taxpayer should provide his own tax information to the financial institution. Any inconvenience would be minor compared to the risk to the tax system of widespread use and disclosure.

I acknowledge that this is a very strong position, one that is not necessarily shared by others within and without the tax administration system. Thus, I believe this is an appropriate area in which Congress could act.

At any rate, particularly with regard to an issue as important as use and disclosure of return information, it is important to hear taxpayer and tax preparer concerns. That is why this regulation and the related revenue procedure were published in proposed form, why we asked for comments from the public, and why the IRS held a public hearing on the regulations. I can assure you that all of the comments will be considered in the course of developing the final regulation. As I stated earlier, I believe it is urgent that the current regulations be revised as soon as possible. Notwithstanding that urgency, I encourage the ABA Tax Section to make its voice heard in this matter, and I invite you to submit your concerns and suggestions, not only to Treasury and the IRS, but also to me directly.

I close where I began, with some personal reflections about the social contract between taxpayers and their government, which they fund. As a private sector tax professional in whom taxpayers – rich and poor – placed their trust, and now as the National Taxpayer Advocate, the statutory voice of the taxpayers inside the IRS, I am amazed at the earnestness of the vast majority of U.S. taxpayers, and their willingness, year after year, to try to get things right with the IRS. It is a privilege to speak up for them, to the best of my ability, and to make sure that the IRS does right by them. In my remarks today, I've discussed a few of my efforts in that regard.

But I am an equal-opportunity curmudgeon, and so now I turn my attention to you-all, in the tax bar. Our tax system is complex – technically, procedurally, and administratively complex. There is an entire segment of the taxpayer population that faces the same types of complexity with respect to its tax issues as your own clients do. Yet these taxpayers cannot afford your representation. They get caught up in the system, make mistakes, compound those mistakes, become even more noncompliant or just drop out – yet in many instances, all of this could be avoided, if they had representation.

Why should this situation be a matter of interest to each one of you? Because just as the tax system has a social contract with the taxpayers, you as tax professionals have a social contract with the tax system. You who make your living from the tax system have a vested interest in ensuring that that system is fair and just, not only for your paying clients, but for those taxpayers who do not have the means to be your paying clients. A tax system cannot be fair and just for only one class of taxpayers. It must be fair and just for all. Access to representation is one of the best guarantors that taxpayer rights will be protected, and it is the obligation of the tax bar to make sure that access to representation is not solely dependent on ability to pay.

I am proud to be a member of the ABA Tax Section. I am proud of the Section's groundbreaking and continuing strong support for low income taxpayers. I am proud of the Section's consistently high quality comments, and in particular of its support

for the Low Income Taxpayer Committee and low income taxpayer clinics. I know of no other tax professional group that dedicates as much resources to supporting access to representation for low income taxpayers and thus fairness in the tax system.

But that's the Tax Section holding up its end of the social contract. Now it's your turn. Each of you reside in a state where there is a low income taxpayer clinic that can benefit from your knowledge, your assistance, your support. I urge you to go [irs.gov](https://www.irs.gov), to the Taxpayer Advocate Service website, and locate the clinic in your state today. Then, contact them! Don't be discouraged if they don't know what to ask from you in the way of help. Make suggestions – help conduct training, lend an attorney to do intake for a few hours, take a *pro bono* case yourself, conduct outreach, help them write a grant proposal, write an article for their newsletter, who knows what else. But I guarantee you this – helping in a low income taxpayer clinic, helping these taxpayers, will be some of the most meaningful work you will ever do in your professional career. It is something relatively easy for tax lawyers to do, and it makes the entire tax system fairer.

Thank you again for inviting me. Now I'll uphold my end of today's social contract by trying to answer any questions you have.