

**BACKGROUND AND DESCRIPTION OF PROPOSALS
RELATING TO TAXPAYER
PROTECTION AND RIGHTS
(TITLE III OF H.R. 2292)**

Scheduled for a Public Hearing

Before the

SUBCOMMITTEE ON OVERSIGHT

of the

HOUSE COMMITTEE ON WAYS AND MEANS

on September 26, 1997

Prepared by the Staff

of the

JOINT COMMITTEE ON TAXATION

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CONTENTS

	<u>Page</u>
INTRODUCTION	1
I. PROVISIONS OF TAXPAYER BILL OF RIGHTS AND TAXPAYER BILL OF RIGHTS 2	2
II. TAXPAYER PROTECTION AND RIGHTS PROVISIONS OF H.R. 2292	5
Sec. 301. Expansion of Authority to Issue Taxpayer Assistance Orders	5
Sec. 302. Expansion of Authority to Award Costs and Certain Fees	5
Sec. 303. Civil Damages for Negligence in Collection Actions	6
Sec. 304. Disclosure of Criteria for Examination Selection	7
Sec. 305. Archival Records of the IRS	7
Sec. 306. Tax Return Information	10
Sec. 307. Freedom of Information	11
Sec. 308. Offers-in-Compromise	13
Sec. 309. Elimination of Interest Differential on Overpayments and Underpayments	14
Sec. 310. Elimination of Application of Failure to Pay Penalty During Period of Installment Agreement	15
Sec. 311. Safe Harbor for Qualification for Installment Agreement	16
Sec. 312. Payment of Taxes	17
Sec. 313. Low Income Taxpayer Clinics	17
Sec. 314. Jurisdiction of the Tax Court	18
Sec. 315. Cataloging Complaints	19
Sec. 316. Procedures Involving Taxpayer Interviews	19
Sec. 317. Explanation of Joint and Several Liability	20
Sec. 318. Procedures Relating to Extensions of Statute of Limitations by Agreement	21
Sec. 319. Review of Penalty Administration	21
Sec. 320. Study of Treatment of All Taxpayers as Separate Filing Units	22
Sec. 321. Study of Burden of Proof	22

INTRODUCTION

This document,¹ prepared by the staff of the Joint Committee on Taxation, provides background and information relating to taxpayer protection and rights. The Subcommittee on Oversight of the House Committee on Ways and Means has scheduled a public hearing to explore these issues on September 26, 1997.

Part I of the document lists the provisions of the Taxpayer Bill of Rights as enacted in 1988 and the provisions of the Taxpayer Bill of Rights 2 as enacted in 1996. Part II of the document describes the taxpayer protection and rights provisions contained in Title III of H.R. 2292 ("Internal Revenue Service Restructuring and Reform Act of 1997").²

¹ This document may be cited as follows: Joint Committee on Taxation, Background and Description of Proposals Relating to Taxpayer Protection and Rights (Title III of H.R. 2292), (JCX-49-97), September 25, 1997.

² H.R. 2292 was introduced by Mr. Portman and Mr. Cardin on July 30, 1997.

I. PROVISIONS OF TAXPAYER BILL OF RIGHTS AND TAXPAYER BILL OF RIGHTS 2

Taxpayer Bill of Rights (1988)

The Omnibus Taxpayer Bill of Rights was enacted in 1988 as part of the Technical and Miscellaneous Revenue Act of 1988.³ It contained the following provisions:

- Disclosure of rights of taxpayers
- Procedures involving taxpayer interviews
- Taxpayers may rely on written advice of Internal Revenue Service
- Taxpayer assistance orders
- Basis for evaluation of Internal Revenue Service employees
- Procedures relating to Internal Revenue Service regulations
- Content of tax due, deficiency, and other notices
- Installment payment of tax liability
- Assistant Commissioner for taxpayer services
- Levy and distraint
- Review of jeopardy levy and assessment procedures
- Administrative appeal of liens
- Awarding costs and certain fees in administrative and court proceedings
- Civil cause of action for damages sustained due to failure to release lien
- Civil cause of action for damages sustained due to certain unauthorized collection actions by Internal Revenue Service
- Assessable penalty for improper disclosure or use of information by preparers of returns
- Jurisdiction of Tax Court to restrain certain premature assessments
- Jurisdiction of Tax Court to enforce overpayment determinations
- Jurisdiction of Tax Court to review certain sales of seized property
- Jurisdiction of Tax Court to redetermine interest on deficiencies
- Jurisdiction of Tax Court to modify decisions in certain estate tax cases

Taxpayer Bill of Rights 2 (1996)

The Taxpayer Bill of Rights 2 was enacted in 1996.⁴ It contained the following provisions:

- Establishment of position of Taxpayer Advocate within Internal Revenue Service

³ Subtitle J of Title VI (Public Law 100-647; November 10, 1988).

⁴ Public Law 104-168; July 30, 1996.

- Expansion of authority to issue Taxpayer Assistance Orders
- Notification of reasons for termination of installment agreements
- Administrative review of termination of installment agreement
- Expansion of authority to abate interest
- Review of IRS failure to abate interest
- Extension of interest-free period for payment of tax after notice and demand
- Abatement of penalty for failure to make required deposits of payroll taxes in certain cases
- Studies of joint return-related issues
- Joint return may be made after separate returns without full payment of tax
- Disclosure of collection activities
- Modifications to lien and levy provisions
- Modifications to certain levy exemption amounts
- Offers-in-compromise
- Civil damages for fraudulent filing of information returns
- Requirement to conduct reasonable investigations of information returns
- United States must establish that its position in proceeding was substantially justified
- Increased limit on attorney fees
- Failure to agree to extension not taken into account
- Award of litigation costs permitted in declaratory judgment proceedings
- Increase in limit on recovery of civil damages for unauthorized collection actions
- Court discretion to reduce award for litigation costs for failure to exhaust administrative remedies
- Preliminary notice requirement
- Disclosure of certain information where more than 1 person liable for penalty for failure to collect and pay over tax
- Right of contribution where more than 1 person liable for penalty for failure to collect and pay over tax
- Volunteer board members of tax-exempt organizations exempt from penalty for failure to collect and pay over tax
- Enrolled agents included as third-party recordkeepers
- Safeguards relating to designated summonses
- Annual report to Congress concerning designated summonses
- Relief from retroactive application of Treasury Department regulations
- Phone number of person providing payee statements required to be shown on such statement
- Required notice of certain payments
- Unauthorized enticement of information disclosure
- Annual reminders to taxpayers with outstanding delinquent accounts
- 5-year extension of authority for undercover operations
- Disclosure of Form 8300 information on cash transactions
- Disclosure of returns and return information to designee of taxpayer
- Study of netting of interest on overpayments and liabilities

- Expenses of detecting of underpayments and fraud, etc.
- Use of private delivery services for timely-mailing-as-timely-filing rule
- Reports on misconduct of IRS employees
- Application of failure-to-pay penalty to substitute returns
- Excise taxes for failure by certain charitable organizations to meet certain qualification requirements
- Reporting of certain excise taxes and other information
- Exempt organizations required to provide copy of return
- Increase in penalties on exempt organizations for failure to file complete and timely annual returns

II. TAXPAYER PROTECTION AND RIGHTS PROVISIONS OF H.R. 2292

Sec. 301. Expansion of Authority to Issue Taxpayer Assistance Orders

Present Law

Taxpayers can request that the Taxpayer Advocate in the Internal Revenue Service ("IRS") issue a taxpayer assistance order ("TAO") if they are suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered (sec. 7811). A TAO may require the IRS to release property of the taxpayer that has been levied upon, or to cease any action, take any action as permitted by law, or refrain from taking any action with respect to the taxpayer.

Description of Proposal

The bill would provide that in making the hardship determination, the Taxpayer Advocate should consider the following four factors: (1) whether the IRS employee to whom the order would be issued is following applicable published administrative guidance, including the Internal Revenue Manual ("IRM"); (2) whether there is an immediate threat of adverse action; (3) whether there has been a delay of more than 30 days in resolving the taxpayer's account problems; and (4) the prospect that the taxpayer will have to pay significant professional fees for representation.

Effective Date

The provision would be effective on the date of enactment.

Sec. 302. Expansion of Authority to Award Costs and Certain Fees

Present Law

Any person who substantially prevails in any action by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty may be awarded reasonable administrative costs incurred before the IRS and reasonable litigation costs incurred in connection with any court proceeding. In general, only an individual whose net worth does not exceed \$2 million is eligible for an award, and only a corporation or partnership whose net worth does not exceed \$7 million is eligible for an award.

Reasonable litigation costs include reasonable fees paid or incurred for the services of attorneys, except that the attorney's fees will not be reimbursed at a rate in excess of \$110 per hour (indexed for inflation) unless the court determines that a special factor, such as the limited availability of qualified attorneys for the proceeding, justifies a higher rate. Awards of

reasonable litigation costs and reasonable administrative costs cannot exceed amounts paid or incurred.

Once a taxpayer has substantially prevailed over the IRS in a tax dispute, the IRS has the burden of proof to establish that it was substantially justified in maintaining its position against the taxpayer. A rebuttable presumption exists that provides that the position of the United States is not considered to be substantially justified if the IRS did not follow in the administrative proceeding (1) its published regulations, revenue rulings, revenue procedures, information releases, notices, or announcements, or (2) a private letter ruling, determination letter, or technical advice memorandum issued to the taxpayer.

Description of Proposal

The bill would: (1) provide that the difficulty of the issues presented or the local availability of tax expertise can be used to justify an award of attorney's fees of more than the statutory limit of \$110 per hour; (2) move the point in time at which both the position of the United States is determined and after which reasonable administrative costs can be awarded to also encompass the date on which the first letter of proposed deficiency which allows the taxpayer an opportunity for administrative review in the IRS Office of Appeals is sent; (3) permit the award of attorney's fees (in amounts determined by the court to be appropriate) to specified persons who represent the taxpayer for no more than a nominal fee; (4) raise the net worth limitation above which attorney's fees may not be awarded to \$5 million (from \$2 million) for individuals and \$35 million (from \$7 million) for corporations and partnerships; and (5) provide that "the position of the United States was not substantially justified if the United States has not prevailed on the same issue in at least 3 United States Courts of Appeal."

Effective Date

The provision would apply to proceedings beginning after the date of enactment.

Sec. 303. Civil Damages for Negligence in Collection Actions

Present Law

A taxpayer may sue the United States for up to \$1 million of civil damages caused by an officer or employee of the IRS who recklessly or intentionally disregards provisions of the Internal Revenue Code or Treasury regulations in connection with the collection of Federal tax with respect to the taxpayer.

Description of Proposal

The bill would also provide for up to \$100,000 in civil damages caused by an officer or employee of the IRS who negligently disregards provisions of the Internal Revenue Code or

Treasury regulations in connection with the collection of Federal tax with respect to the taxpayer.

Effective Date

The provision would be effective with respect to actions of officers or employees of the IRS occurring after the date of enactment.

Sec. 304. Disclosure of Criteria for Examination Selection

Present Law

The IRS examines Federal tax returns to determine the correct liability of taxpayers. The IRS selects returns to be audited in a number of ways, such as through a computerized classification system (the discriminant function ("DIF") system).

Description of Proposal

The bill would require that IRS add to Publication 1 ("Your Rights as a Taxpayer") "a statement which sets forth in simple and nontechnical terms the criteria and procedures for selecting taxpayers for examination." The statement must not include any information the disclosure of which would be detrimental to law enforcement. The statement must specify the general procedures used by the IRS, including the extent to which taxpayers are selected for examination on the basis of information in the media or from informants. Drafts of the statements would be required to be submitted to the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation.

Effective Date

The addition to Publication 1 would have to be made not later than 180 days after the date of enactment.

Sec. 305. Archival Records of the IRS

Present Law

The IRS is obligated to transfer agency records to the National Archives and Records Administration ("NARA") for retention or disposal. The IRS is also obligated to protect confidential taxpayer records from disclosure. These two obligations have created conflict between NARA and the IRS. Under present law, the IRS determines whether records contain taxpayer information. Once the IRS has made that determination, NARA is not permitted to examine those records. NARA has expressed concern that the IRS may be using the disclosure prohibition to improperly conceal agency records with historical significance.

IRS obligation to archive records

The IRS, like all other Federal agencies, must create, maintain, and preserve agency records in accordance with section 3101 of title 44 of the United States Code. NARA is the Government agency responsible for overseeing the management of the records of the Federal government.⁵ Federal agencies are required to deposit significant and historical records with NARA.⁶ The head of each Federal agency must also establish safeguards against the removal or loss of records.⁷

Authority of NARA

NARA is authorized, under the Federal Records Act, to establish standards for the selective retention of records of continuing value.⁸ NARA has the statutory authority to inspect records management practices of Federal agencies and to make recommendations for improvement.⁹ The head of each Federal agency must submit to NARA a list of records to be destroyed and a schedule for such destruction.¹⁰ NARA examines the list to determine if any of the records on the list have sufficient administrative, legal research, or other value to warrant their continued preservation. In many cases, the description of the record on the list is sufficient for NARA to make the determination. For example, NARA does not need to inspect Presidential tax returns to determine that they have historical value and should be retained. In some cases, NARA may find it helpful to examine a particular record. NARA has general authority to inspect records solely for the purpose of making recommendations for the improvement of record management practices.¹¹ However, tax returns and return information can only be disclosed under the authority provided in section 6103 of the Internal Revenue Code. There is no exception to the disclosure prohibition for records management inspection by NARA.¹²

⁵ 44 U.S.C. sec. 2904.

⁶ 5 U.S.C. sec. 552a(b)(6).

⁷ 44 U.S.C. sec. 3105.

⁸ 44 U.S.C. sec. 2905.

⁹ 44 U.S.C. sec. 2904(c)(7).

¹⁰ 44 U.S.C. sec. 3303.

¹¹ 44 U.S.C. sec. 2906.

¹² American Friends Service Committee v. Webster, 720 F.2d 29 (D.C. Cir. 1983).

In connection with its evaluation of the record management system of the IRS, NARA noted several instances where the disclosure prohibitions of Code section 6103 complicated their review of many IRS records.

NARA is also responsible for the custody, use and withdrawal of records transferred to it.¹³ Statutory provisions that restrict public access to the records in the hands of the agency from which the records were transferred also apply to NARA. Thus, if a confidential record, such as a Presidential tax return, is transferred to NARA for archival storage, NARA is not permitted to disclose it. In general, the application of such restrictions to records in the hands of NARA expire after the records have been in existence for 30 years.¹⁴ The issue of whether the specific disclosure prohibition of section 6103 takes precedence over the general 30-year expiration of restrictions generally applicable to records in the hands of NARA has not been addressed by a court, but an informal advisory opinion from the Office of Legal Counsel of the Attorney General concluded that the 30-year expiration provision would not reach records subject to section 6103.¹⁵

Confidentiality requirements

The IRS must preserve the confidentiality of taxpayer information contained in Federal income tax returns. Such information may not be disclosed except as authorized under Code section 6103. Section 6103 was substantially revised in 1976 to address Congress' concern that tax information was being used by Federal agencies in pursuit of objectives unrelated to administration and enforcement of the tax laws. Congress believed that the wide-spread use of tax information by agencies other than the IRS could adversely affect the willingness of taxpayers to comply voluntarily with the tax laws and could undermine the country's self-assessment tax system.¹⁶ Section 6103 does not authorize the disclosure of confidential return information to NARA.

Section 6103 restricts the disclosure of returns and return information only. Return means any tax or information return, declaration of estimated tax, or claim for refund, including schedules and attachments thereto, filed with the IRS. Return information includes the taxpayer's name; nature and source or amount of income; and whether the taxpayer's return is under investigation. Section 6103(b)(2) provides that "nothing in any other provision of law shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the

¹³ 44 U.S.C. sec. 2108.

¹⁴ 44 U.S.C. sec. 2108.

¹⁵ Department of Justice, Office of Legal Counsel, Memorandum to Richard K. Willard, Assistant Attorney General (Civil Division) (February 27, 1986).

¹⁶ S. Rept. 94-938, p. 317 (1976).

Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.” Section 6103 does not restrict the disclosure of other records required to be maintained by the IRS, such as records documenting agency policy, programs and activities, and agency histories. Such records are required to be made available to the public under the Freedom of Information Act (“FOIA”).¹⁷

Description of Proposal

The bill would provide an exception to the disclosure rules to permit NARA to review IRS records for archival purposes. NARA, through its head, the Archivist, may make a written request for disclosure of all records of the IRS for purposes of scheduling such records for destruction or retention in the National Archives. The bill would prohibit NARA from disclosing the records retained in the National Archives without the express written approval of the Secretary of the Treasury.¹⁸

Effective Date

The provision would be effective for requests made by the Archivist after the date of enactment.

Sec. 306. Tax Return Information

Present Law

The Internal Revenue Code prohibits disclosure of tax returns and return information, except to the extent specifically authorized by the Internal Revenue Code (sec. 6103). Unauthorized disclosure is a felony punishable by a fine not exceeding \$5,000 or imprisonment of not more than five years, or both (sec. 7213). An action for civil damages also may be brought for unauthorized disclosure (sec. 7431). No tax information may be furnished by the IRS to another agency unless the other agency establishes procedures satisfactory to the IRS for safeguarding the tax information it receives (sec. 6103(p)).

¹⁷ FOIA does not require disclosure of records or information that would frustrate law enforcement efforts. 5 U.S.C. sec. 552(b)(7). 5 U.S.C. sec. 552.

¹⁸ As drafted, the bill would impose greater restrictions on NARA’s disclosure of IRS material than exist under current law, as the restriction on disclosure would apply to all records, not just those currently protected under section 6103.

Description of Proposal

The bill would require the Joint Committee on Taxation to convene a study, led by a panel of experts appointed by the Joint Committee, on provisions regarding taxpayer confidentiality. The study is to examine present-law protections of taxpayer privacy, the need for third parties to use tax return information, and the ability to achieve greater levels of voluntary compliance by allowing the public to know who is legally required to file tax returns but does not do so.

Effective Date

The findings of the study, along with any recommendations, would be required to be reported to the Congress no later than one year after the date of enactment.

Sec. 307. Freedom of Information

Present Law

The Freedom of Information Act ("FOIA") requires most written material produced by Federal agencies to be made public.¹⁹ The purpose of FOIA is to ensure that citizens are informed about actions taken by their government, so that citizens can operate as a check against corruption by holding their government accountable. Unless agency information is exempt from FOIA, it must be made available to the public. The IRS is required to make records specifically described and requested by any person promptly available, unless the records are published in the Federal Register or are available in one of the IRS public reading rooms for inspection and copying.

The IRS publishes the following types of information: (1) descriptions of its central and field organization; (2) statements of functions; (3) rules of procedure and descriptions of forms and where forms may be obtained; (4) substantive rules of general applicability and statements of general policy; and (5) amendments to the matters described in (1) through (4). The IRS makes available for inspection and copying the following types of information: (1) final opinions, including concurring and dissenting opinions, and orders; (2) statements of policy and interpretations that have not been published in the Federal Register; and (3) administrative staff manuals and instructions to staff that affect a member of the public. The IRS makes available on request all other records that are under the control of the IRS and are not subject to an exception to FOIA.²⁰

¹⁹ 5 U.S.C. sec. 552.

²⁰ 26 C.F.R. sec. 601.702(c).

Requests must be made in writing, signed by the requester, and must reasonably describe the records requested.²¹ The reasonable description requirement is generally met if the request gives the name, subject matter, location, and years in issue for the requested records. The initial determination of whether a request for records will be granted is to be made within 10 working days of the date of receipt of the request. The IRS may have a 10-day extension of this time only if the requester agrees. The requester is entitled to file an administrative appeal within 35 days after the denial of the request or the expiration of the 10-day initial determination period (with extensions). The requester is entitled to judicial review of the initial determination if the administrative appeal has not been granted within 20 working days.

In 1996, Congress amended the applicable statute to provide new procedures, applicable to all Federal agencies, for processing FOIA requests.²² The amendments, known as the Electronic Freedom of Information Act ("EFOIA") became effective 180 days after October 2, 1996. Recognizing that many Federal agencies had a significant backlog of FOIA requests that prevented processing in a timely fashion, EFOIA provides that the initial determination of whether a request will be granted is to be made within 20 working days of the date of receipt of the request. If the agency anticipates that it cannot make the initial determination within the specified time period, it must notify the requester and give the requester an opportunity to limit the scope of the request so that the determination may be made within the time period or to arrange an alternative time frame with the agency.

EFOIA requires each agency to promulgate regulations providing for expedited processing of requests for records if the requester demonstrates a compelling need.²³ A "compelling need" includes, with respect to a request made by the media, urgency to inform the public concerning actual or alleged Federal Government activity. The determination of whether expedited processing will be granted shall be made within 10 working days of the request.

EFOIA also requires agencies to make an annual report to the Attorney General about the number of FOIA requests received and processed, the status of pending requests and appeals, and the time and resources used to respond to FOIA requests.

Description of Proposal

The bill would require the Secretary of the Treasury to develop procedures for expedited processing of FOIA requests when (1) there exists widespread and exceptional media interest in

²¹ 26 C.F.R. sec. 601.702(c)(3).

²² Public Law 104-231; October 2, 1996.

²³ 5 U.S.C. sec. 552(a)(6)(E).

the requested information, and (2) expedited processing²⁴ is warranted because the information sought involves possible questions about the government's integrity which affect public confidence.

Under the bill, the IRS would be required to provide an explanation to the requester if the request is not satisfied within 30 days. If the request for information is not granted within 60 days, the requester would be eligible to seek judicial review.

The Secretary of the Treasury would be required to submit drafts of the procedures for expedited processing to the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation.

Effective Date

The procedures required by the bill are to be developed not later than 180 days after the date of enactment.

Sec. 308. Offers-in-Compromise

Present Law

Section 7122 of the Code permits the IRS to compromise a taxpayer's tax liability. In general, this occurs when a taxpayer submits an offer-in-compromise to the IRS. An offer in compromise is a proposal to settle unpaid tax accounts for less than the full amount of the assessed balance due. An offer in compromise may be submitted for all types of taxes, as well as interest and penalties, arising under the Internal Revenue Code.

Taxpayers submit an offer in compromise on Form 656. There are two bases on which an offer can be made. The first is doubt as to the liability for the amount owed. The second is doubt as to the taxpayer's ability fully to pay the amount owed. An application can be made on either or both of these grounds. Taxpayers are required to submit background information to the IRS substantiating their application. If they are applying on the basis of doubt as to the taxpayer's ability fully to pay the amount owed, the taxpayer must complete a financial disclosure form enumerating assets and liabilities.

As part of an offer-in-compromise made on the basis of doubt as to ability fully to pay, taxpayers must agree to comply with all provisions of the Internal Revenue Code relating to filing returns and paying taxes for five years from the date the IRS accepts the offer. Failure to

²⁴ The bill does not appear to provide any coordination with the provisions of EFOIA, which, as described above, also provide for expedited processing of FOIA requests.

observe this requirement permits the IRS to begin immediate collection actions for the original amount of the liability.

Description of Proposal

The bill would require the IRS to develop and publish schedules of national and local allowances to ensure that taxpayers entering into an offer-in-compromise have an adequate means to provide for basic living expenses.

Effective Date

The provision would be effective on the date of enactment.

Sec. 309. Elimination of Interest Differential on Overpayments and Underpayments

Present Law

If any portion of a tax is satisfied through the crediting of an overpayment of tax, no interest is imposed on that portion of the tax for any period during which, if the credit had not been made, interest would have been allowable.

The Tax Reform Act of 1986 first implemented an interest rate differential. The underpayment rate was set 1 percent higher than the overpayment rate. The Conference Report to the Tax Reform Act of 1986 stated:

[t]o the extent a portion of tax due is satisfied by a credit of an overpayment, no interest is imposed on that portion of the tax. Consequently, if an underpayment of \$1,000 occurs in year 1, and an overpayment of \$1,000 occurs in year 2, no interest is imposed in year 2 because of the rule of section 6601(f). The IRS can at present net many of these offsetting overpayments and underpayments. Nevertheless, the IRS will require a transition period during which to coordinate differential interest rates...[t]he Secretary of the Treasury may prescribe regulations providing for netting of tax underpayments and overpayments through the period ending three years after the date of enactment of TBOR 2. By that date, the IRS should have implemented the most comprehensive netting procedures that are consistent with sound administrative practice.

The Omnibus Budget Reconciliation Act of 1990 increased the underpayment rate on certain large corporate underpayments to 3 percent higher than the overpayment rate. The Conference Report stated:

Under present law, the Secretary has the authority to credit the amount of any overpayment against any liability under the Code...to the extent a portion of tax due is satisfied by a credit of an overpayment, no interest is imposed on that

portion of the tax... The Secretary should implement the most comprehensive crediting procedures under section 6402 that are consistent with sound administrative practice.

The General Agreement on Tariffs and Trade (GATT) reduced the overpayment rate on certain corporate tax refunds. The legislative history of the GATT legislation stated that:

The Secretary of the Treasury should implement the most comprehensive crediting procedures under section 6402 that are consistent with sound administrative practice, and should do so as rapidly as is practicable.

TBOR 2 required the Secretary of the Treasury to conduct a study of the manner in which the IRS has implemented the netting of interest on overpayments and underpayments and the policy and administrative implications of global netting. The Treasury issued its study on April 18, 1997. The study concluded that, while global interest netting would be consistent with the intent expressed by Congress in the past, additional legislation would be necessary to achieve this policy goal.

Description of Proposal

The bill would provide that the rate of interest would be the same for both overpayments and underpayments; that rate would be the rate determined by the Secretary to result in the same net revenue to the Government as would have resulted without regard to this provision.

Effective Date

The provision would be effective for purposes of determining interest for periods after the date of enactment.

Sec. 310. Elimination of Application of Failure to Pay Penalty During Period of Installment Agreement

Present Law

Section 6159 of the Code authorizes the IRS to enter into written agreements with any taxpayer under which the taxpayer is allowed to pay taxes owed, as well as interest and penalties, in installment payments if the IRS determines that doing so will facilitate collection of the amounts owed. An installment agreement does not reduce the amount of taxes, interest, or penalties owed; it does, however, provide for a longer period during which payments may be made during which other IRS enforcement actions (such as levies or seizures) are held in abeyance. Many taxpayers can request an installment agreement by filing Form 9465. This form is relatively simple and does not require the submission of detailed financial statements. The IRS in most instances readily approves these requests if the amounts involved are not large and if the taxpayer has filed tax returns on time in the past. Some taxpayers are required to

submit background information to the IRS substantiating their application. If the request for an installment agreement is approved by the IRS, a user fee of \$43 is charged.²⁵ This user fee is in addition to the tax, interest, and penalties that are owed.

One penalty that may continue to apply during the period of an installment agreement is the penalty for failure to pay taxes (sec. 6651(a)). This penalty is a half percent per month of the amount owed, up to a maximum of 25 percent. If the failure to pay is fraudulent, the maximum penalty is 75 percent.

Description of Proposal

The bill would provide that the penalty for failure to pay taxes would not apply for the period that an installment agreement is in effect.

Effective Date

The provision would apply to installment agreements entered into after the date of enactment.

Sec. 311. Safe Harbor for Qualification for Installment Agreement

Present Law

Section 6159 of the Code authorizes the IRS to enter into written agreements with any taxpayer under which the taxpayer is allowed to pay taxes owed, as well as interest and penalties, in installment payments if the IRS determines that doing so will facilitate collection of the amounts owed. An installment agreement does not reduce the amount of taxes, interest, or penalties owed; it does, however, provide for a longer period during which payments may be made during which other IRS enforcement actions (such as levies or seizures) are held in abeyance. Many taxpayers can request an installment agreement by filing Form 9465. This form is relatively simple and does not require the submission of detailed financial statements. The IRS in most instances readily approves these requests if the amounts involved are not large and if the taxpayer has filed tax returns on time in the past. Some taxpayers are required to submit background information to the IRS substantiating their application.

Description of Proposal

The bill would require the IRS to enter into an installment agreement with a taxpayer provided that: (1) the amount of the tax liability is \$10,000 or less; (2) the taxpayer has not failed

²⁵ This user fee is imposed pursuant to 31 U.S.C. sec. 9701. See T.D. 8589 (February 14, 1995).

to file any tax return or pay any tax during the preceding five years; and (3) the taxpayer has not previously entered into an automatic installment agreement as provided for in the bill.

Effective Date

The provision would apply to installment agreements entered into after the date of enactment.

Sec. 312. Payment of Taxes

Present Law

The Code provides that it is lawful for the Secretary to accept checks or money orders as payment for taxes, to the extent and under the conditions provided in regulations prescribed by the Secretary (sec. 6311). Those regulations²⁶ state that checks or money orders should be made payable to the Internal Revenue Service.

Description of Proposal

The bill would require the Secretary or his delegate to establish such rules, regulations, and procedures as are necessary to require payment of taxes by check or money order to be made payable to the Treasurer, United States of America.

Effective Date

The provision would be effective on the date of enactment.

Sec. 313. Low-Income Taxpayer Clinics

Present Law

There are no provisions in present law providing for assistance to clinics that assist low-income taxpayers.

Description of Proposal

The bill would require the Secretary to make matching grants for the development, expansion, or continuation of certain low-income taxpayer clinics. Eligible clinics would be those that charge no more than a nominal fee to represent low-income taxpayers in controversies with the IRS and also provide tax information to individuals for whom English is a second language. The term "clinic" would include (1) a clinical program at an accredited law school in

²⁶ Treas. Reg. Sec. 301.6311-1(a)(1).

which students represent low-income taxpayers, and (2) an organization exempt from tax under Code section 501(c) which either represents low-income taxpayers or provides referral to qualified representatives.

A clinic would be treated as representing low-income taxpayers if at least 90 percent of the taxpayers represented by the clinic have income which does not exceed 250 percent of the poverty level, and the amount in controversy is \$10,000 or less.

The aggregate amount of grants to be awarded each year would be limited to \$3,000,000. No one taxpayer clinic would receive more than \$100,000 per year. The clinic must provide matching funds on a dollar-for-dollar basis. Matching funds may include faculty and clinic administration salaries and clinic equipment costs, but not general institutional overhead.

The following criteria would be considered in making awards: (1) number of taxpayers served by the clinic, including the number of taxpayers in the geographical area for whom English is a second language; (2) the existence of other taxpayer clinics serving the same population; (3) the quality of the program; and (4) alternative funding sources available to the clinic.

Effective Date

The provision would be effective on the date of enactment.

Sec. 314. Jurisdiction of the Tax Court

Present Law

Taxpayers may choose to contest many tax disputes in the Tax Court. Special small case procedures apply to disputes involving \$10,000 or less, if the taxpayer chooses to utilize these procedures (and the Tax Court concurs) (sec. 7463).

Description of Proposal

The bill would increase the cap for small case treatment from \$10,000 to \$25,000.²⁷

Effective Date

The provision would apply to proceedings commenced after the date of enactment.

²⁷ This section of the bill also contains two proposals the substance of which became present law after the date of introduction of H.R. 2292. See sections 505 and 1452 of the Taxpayer Relief Act of 1997 (Public Law 105-34; August 5, 1997).

Sec. 315. Cataloging Complaints

Present Law

The IRS is required to make an annual report to the Congress, beginning in 1997, on all categories of instances involving allegations of misconduct by IRS employees, arising either from internally identified cases or from taxpayer or third-party initiated complaints.²⁸ The report must identify the nature of the misconduct or complaint, the number of instances received by category, and the disposition of the complaint.

Description of Proposal

The bill would require that the Commissioner develop procedures to catalog and review taxpayer complaints of misconduct by IRS employees. These procedures would be required to include guidelines for internal review and discipline of employees, as warranted by the scope of the complaints. The bill would also require that the Commissioner establish a toll-free telephone number for taxpayers to register complaints of misconduct by IRS employees and publish the number in Publication 1 ("Your Rights as a Taxpayer").

Effective Date

The requirements would have to be met as soon as practicable, but not later than 180 days after the date of enactment.

Sec. 316. Procedures Involving Taxpayer Interviews

Present Law

Prior to or at initial in-person audit interviews, the IRS must explain to taxpayers the audit process and taxpayers' rights under that process (sec. 7521). In addition, prior to or at initial in-person collection interviews, the IRS must explain the collection process and taxpayers' rights under that process. If a taxpayer clearly states that during an interview with the IRS that the taxpayer wishes to consult with the taxpayer's representative, the interview must be suspended to afford the taxpayer a reasonable opportunity to consult with the representative.

Description of Proposal

The bill would require that, prior to initial in-person audit interviews, the IRS must do four additional things. First, the IRS must ask whether the taxpayer is represented by a representative. If the taxpayer is so represented, the interview may not proceed without the presence of the representative unless the taxpayer consents. Second, the IRS must also explain

²⁸ Section 1211 of the Taxpayer Bill of Rights 2 (Public Law 104-168; July 30, 1996).

that the taxpayer has the right to have the interview take place in a reasonable place and that it does not have to take place in the taxpayer's home. Third, the IRS must explain to the taxpayer the reasons for the selection of the taxpayer's return for examination. Fourth, the IRS must provide to the taxpayer a written explanation of the applicable burdens of proof on taxpayers and on the IRS.

Effective Date

The provision would apply to interviews and examinations taking place after the date of enactment.

Sec. 317. Explanation of Joint and Several Liability

Present Law

In general, spouses who file a joint tax return are each fully responsible for the accuracy of the tax return and for the full liability. This is true even though only one spouse may have earned the wages or income which is shown on the return. This is "joint and several" liability. Spouses who wish to avoid joint and several liability may file as a married person filing separately. Special rules apply in the case of innocent spouses pursuant to section 6013(e).

Description of Proposal

The bill would require that, no later than 180 days after the date of enactment, the IRS must establish procedures clearly to alert taxpayers of their joint and several liability on all tax forms,²⁹ publications, and instructions.³⁰ The IRS must include explanations of the possible consequences of joint and several liability. Drafts of the statements would be required to be submitted to the House Committee on Ways and Means, the Senate Committee on Finance, and the Joint Committee on Taxation.

Effective Date

The bill would require that the procedures be established as soon as practicable, but no later than 180 days after the date of enactment.

²⁹ The bill would require that this be done for all forms, publications, and instructions, regardless of whether the form, publication, or instruction is applicable to individuals.

³⁰ Because the bill imposes this requirement for both forms and instructions, the requirement may be fulfilled only by putting the required notification directly on both the form itself and on the accompanying instructions.

Sec. 318. Procedures Relating to Extensions of Statute of Limitations by Agreement

Present Law

The statute of limitations within which the IRS may assess additional taxes is generally three years from the date a return is filed (sec. 6501).³¹ Prior to the expiration of the statute of limitations, both the taxpayer and the IRS may agree in writing to extend the statute, using Form 872 or 872-A. An extension may be for either a specified period or an indefinite period. The statute of limitations within which a tax may be collected after assessment is 10 years after assessment (sec. 6502). Prior to the expiration of the statute of limitations, both the taxpayer and the IRS may agree in writing to extend the statute, using Form 900.

Description of Proposal

The bill would require that, on any occasion on which the taxpayer is requested by the IRS to extend the statute of limitations, the IRS must notify the taxpayer of the taxpayer's right to refuse to extend the statute of limitations or to limit the extension to particular issues.

Effective Date

The provision would apply to requests to extend the statute of limitations made after the date of enactment.

Sec. 319. Review of Penalty Administration

Present Law

The last major revision of the overall penalty structure in the Internal Revenue Code was the Improved Penalty Administration and Compliance Tax Act, part of the Omnibus Budget Reconciliation Act of 1989.³²

Description of Proposal

The bill would require the Taxpayer Advocate to prepare a study and to provide an independent report to the Congress reviewing the administration and implementation of the "penalty reform recommendations" made in the Omnibus Budget Reconciliation Act of 1989, including legislative and administrative recommendations to simplify penalty administration and reduce taxpayer burden.

³¹ For this purpose, a return filed before the due date is considered to be filed on the due date.

³² Subtitle G of Title 7 of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101-239).

Effective Date

The report must be provided not later than July 30, 1998.

Sec. 320. Study of Treatment of All Taxpayers as Separate Filing Units

Present Law

The Code enumerates four filing statuses for individuals: (1) married individuals filing joint returns and surviving spouses; (2) heads of households; (3) unmarried individuals; and (4) married individuals filing separate returns (sec. 1).

Description of Proposal

The bill would require the Secretary or his delegate and, in addition, the General Accounting Office ("GAO"), to conduct separate studies on the feasibility of treating each individual separately for all purposes of the Code. The studies would be required to include recommendations for eliminating the marriage penalty, addressing community property issues, and reducing the burden for divorced and separated taxpayers.

Effective Date

The studies would be required to be provided to the Congress no later than 180 days after the date of enactment.

Sec. 321. Study of Burden of Proof

Present Law

Under present law, a rebuttable presumption exists that the Commissioner's determination of tax liability is correct.³³ "This presumption in favor of the Commissioner is a procedural device that requires the plaintiff to go forward with prima facie evidence to support a finding contrary to the Commissioner's determination. Once this procedural burden is satisfied, the taxpayer must still carry the ultimate burden of proof or persuasion on the merits. Thus, the plaintiff not only has the burden of proof of establishing that the Commissioner's determination was incorrect, but also of establishing the merit of its claims by a preponderance of the evidence".³⁴

³³ Welch v. Helvering, 290 U.S. 111, 115 (1933).

³⁴ Danville Plywood Corp. v. U.S., U.S. Cl. Ct., 63 AFTR 2d 89-1036, 1043 (1989); citations omitted.

The general rebuttable presumption that the Commissioner's determination of tax liability is correct is a fundamental element of the structure of the Internal Revenue Code. Although this presumption is judicially based, rather than legislatively based, there is considerable evidence that the presumption has been repeatedly considered and approved by the Congress. This is the case because the Internal Revenue Code contains a number of civil provisions that explicitly place the burden of proof on the Commissioner in specifically designated circumstances. The Congress would have enacted these provisions only if it recognized and approved of the general rule of presumptive correctness of the Commissioner's determination. A list of these civil provisions follows.

(1) Fraud.--Any proceeding involving the issue of whether the taxpayer has been guilty of fraud with intent to evade tax (secs. 7454(a) and 7422(e)).

(2) Required reasonable verification of information returns.--In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary has the burden of producing reasonable and probative information concerning such deficiency in addition to such information return (sec. 6201(d)).

(3) Foundation managers.--Any proceeding involving the issue of whether a foundation manager has knowingly participated in prohibited transactions (sec. 7454(b)).

(4) Transferee liability.--Any proceeding in the Tax Court to show that a petitioner is liable as a transferee of property of a taxpayer (sec. 6902(a)).

(5) Review of jeopardy levy or assessment procedures.--Any proceeding to review the reasonableness of a jeopardy levy or jeopardy assessment (sec. 7429(g)(1)).

(6) Property transferred in connection with performance of services.--In the case of property subject to a restriction that by its terms will never lapse and that allows the transferee to sell only at a price determined under a formula, the price is deemed to be fair market value unless established to the contrary by the Secretary (sec. 83(d)(1)).

(7) Illegal bribes, kickbacks, and other payments.--As to whether a payment constitutes an illegal bribe, illegal kickback, or other illegal payment (sec. 162(c)(1) and (2)).

(8) Golden parachute payments.--As to whether a payment is a parachute payment on account of a violation of any generally enforced securities laws or regulations (sec. 280G(b)(2)(B)).

(9) Unreasonable accumulation of earnings and profits.--In any Tax Court proceeding as to whether earnings and profits have been permitted to accumulate beyond the reasonable needs of the business, provided that the Commissioner has not fulfilled specified procedural requirements (sec. 534).

(10) Expatriation.--As to whether it is reasonable to believe that an individual's loss of citizenship would result in a substantial reduction in the individual's income taxes or transfer taxes (secs. 877(e), 2107(e), 2501(a)(4)).

(11) Public inspection of written determinations.--In any proceeding seeking additional disclosure of information (sec. 6110(f)(4)(A)).

(12) Penalties for promoting abusive tax shelters, aiding and abetting the understatement of tax liability, and filing a frivolous income return.--As to whether the person is liable for the penalty (sec. 6703(a)).

(13) Income tax return preparers' penalty.--As to whether a preparer has willfully attempted to understate tax liability (sec. 7427).

(14) Bankruptcy claims.--As to whether the IRS has a valid claim against the debtor's assets in any bankruptcy proceeding (11 U.S.C. 3001(f)).³⁵

(15) Status as employees.--As to whether individuals are employees for purposes of employment taxes (pursuant to the safe harbor provisions of section 530 of the Revenue Act of 1978).³⁶

Description of Proposal

The bill would require GAO to prepare a report on the burdens of proof for taxpayers and the IRS in tax controversies. The report would be required to highlight the differences between these burdens and the burdens imposed in other disputes with the Federal Government. The report would also be required to comment on the impact of changing these burdens on tax administration and taxpayer rights.

³⁵ Also, see In re Fidelity Holding Company, Ltd., 837 F.2d 696 (5th Cir. 1988) (holding that burden of proof does not change because Government is claimant).

³⁶ Public Law 95-600; November 6, 1978, as amended by sec. 1122 of the Small Business Job Protection Act of 1996 (Public Law 104-188; August 20, 1996).

Effective Date

The report would be required to be provided to the Congress no later than 180 days after the date of enactment.