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## Tax Amnesties, Recidivism, and the Need for Reform

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### **Abstract**

For years, governments have instituted and administered tax amnesty programs of various forms. At least as measured by the metric of revenue collections, some of these programs have proven successful and others have not. However, none of these many programs properly accounts for the issue of recidivism in a meaningful manner. To address this problem and to enhance long-term tax compliance outcomes, this analysis advocates that legislative governing bodies make tax amnesty programs a one-time option: taxpayers who participate in one tax amnesty program would be barred from subsequent tax amnesty participation offered by the same taxing jurisdiction involving the same type of tax.

Keywords: Tax amnesty, tax compliance, recidivism  
JEL codes: H26, H31, H71, K42

# TAX AMNESTIES, RECIDIVISM, AND THE NEED FOR REFORM

By James Alm & Jay A. Soled \*

## ABSTRACT

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## I. INTRODUCTION

When it comes to fulfilling their civic responsibilities, taxpayers are notorious for not always being forthright. They often underreport their income,<sup>1</sup> overstate their deductions,<sup>2</sup> or simply fail to file their returns.<sup>3</sup> Evidence for this proposition abounds. Consider a salient fact: The nation's voluntary compliance rate with all federal government taxes hovers slightly above 80 percent,<sup>4</sup> where it has been for the last half century. This means that approximately one out of five taxpayers misreports his or her income or other taxes at the federal level. Evidence suggests that the same (often higher) noncompliance rate is likely true at the state level as well.<sup>5</sup>

Governments have instituted all sorts of measures to improve taxpayer compliance. Such undertakings include, but are not limited to, increasing the budgets of their enforcement arms,<sup>6</sup>

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<sup>1</sup> See, e.g., Susan Cleary Morse, Stewart Karlinsky & Joseph Bankman, *Cash Businesses and Tax Evasion*, 30 STAN. L. & POL'Y REV. 37 (2009) (presenting evidence that cash businesses tend to underreport their income).

<sup>2</sup> See, e.g., Myron Hulen, William Kenny, Jack Robison & D. Michael Vaughan, *Independent Contractors: Compliance and Classification Issues*, 11 AM. J. TAX POL'Y 13 (1994) (discussing the proclivity of independent contractors to overstate their tax deductions).

<sup>3</sup> See, e.g., George K. Yin, *Principles and Practices to Enhance Compliance and Enforcement of the Personal Income Tax*, 31 VA. TAX REV. 381 (2012) (discussing, among other things, the problem of nonfilers).

<sup>4</sup> See JOINT COMM. ON TAXATION, JCX-19-19, OVERVIEW OF THE TAX GAP 2 (May 8, 2019) ("With total average tax liabilities of \$2.5 trillion per year between 2008 and 2010, the voluntary compliance rate is 81.7 percent and the net compliance rate is 83.7 percent.").

<sup>5</sup> See, e.g., Darren Azman, *Don't Tell Mom I Didn't Pay My Taxes!: The Efficacy of State Shaming Campaigns*, 63 TAX LAW. 1251, 1252 (2010) ("State tax gaps represent a staggering amount of foregone revenue each year in all 50 states."); James Alm, *Estimating the "Tax Gap" at the State Level: The Case of Georgia's Personal Income Tax*, 34 PUB. BUDGETING & FIN. 61 (2014) ("The estimated range of the personal income tax gap is \$1.4 billion to \$2.9 billion, for a voluntary compliance rate that ranges from 89.8 percent to 80.8 percent.").

<sup>6</sup> See Scott Levy, *Spending Money to Make Money: CBO Scoring of Secondary Effects*, 127 YALE L.J. 936, 936 (2018) ("Increased funding for federal enforcement and program integrity often pays for itself through what are called 'secondary effects.' In some cases, the funding allows agencies to collect more revenue; in others, it enables agencies to reduce the amount of money lost to waste, fraud, and abuse.").

raising dereliction penalties,<sup>7</sup> and educating the public regarding the virtues of tax compliance.<sup>8</sup> At least as demonstrated by tax compliance rates,<sup>9</sup> the outcomes of such efforts have been mixed.

To augment taxpayer compliance, as well as to generate revenues, another commonplace strategy has been the institution of tax amnesty programs.<sup>10</sup> A tax amnesty program allows individuals or firms to pay delinquent taxes without being subject to some or all of the financial and criminal penalties that the discovery of tax evasion normally brings. A typical tax amnesty program has several common features. Prior to being contacted by tax authorities, participating taxpayers must acknowledge their tax-filing flaws or delinquencies; they must then correct filed returns or submit missing ones; and they must pay the tax owed plus interest and, if applicable, penalties. As a quid pro quo for program participation, taxpayers typically secure relief from criminal sanctions and the reduction or elimination of penalty amounts;<sup>11</sup> in addition, elected and tax officials give taxpayers to a fresh start, tacitly welcoming them back into the compliance fold.

However, such a typical tax amnesty program suffers from a fundamental flaw: The program fails to adequately acknowledge the problem of recidivism, so that those who have a proclivity to cheat are apt to repeat these behaviors.<sup>12</sup> At least in the criminal realm, it is well-

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<sup>7</sup> By way of example, the American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, provided new disclosure and reporting requirements for material advisers, enhanced sanctions and penalties for failure to disclose listed and reportable transactions, increased penalties for tax shelter promoters, and expanded the authority of the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. See, Megan L. Brackney, *Reporting Loss Transactions: Too Much of A Good Thing*, 59 N.Y.L. SCH. L. REV. 317, 318 (2015) (“Congress was motivated to enact this legislation based on reports by the Internal Revenue Service (IRS) revealing that over approximately a decade, several hundred thousand participants were likely engaged in abusive tax avoidance schemes, totaling approximately tens of billions of dollars of tax losses.”).

<sup>8</sup> See, e.g., Mark F. Sommer, *Disclosure of Currency Transaction Violations: When, How and What If You Don't?*, 47 TAX LAW. 139, 148 (1993) (“In a concerted effort to increase tax compliance by those whom the Service terms ‘non-filers,’ Commissioner Peterson mounted an aggressive campaign during 1992 to educate the public on the Service’s voluntary disclosure program.”).

<sup>9</sup> See *supra* note 4.

<sup>10</sup> See Elliot Uchitelle, *The Effectiveness of Tax Amnesty Programs in Select Countries*, FRBNY Q. 48 (1989), available at [https://www.newyorkfed.org/medialibrary/media/research/quarterly\\_review/1989v14/v14n3article5.pdf](https://www.newyorkfed.org/medialibrary/media/research/quarterly_review/1989v14/v14n3article5.pdf) (surveying different countries’ amnesty programs and what worked and what did not).

<sup>11</sup> See Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 694 (2007) (“[A] typical tax amnesty offers tax evaders a window of opportunity within which to voluntarily disclose their evasion in exchange for the reduction or elimination of penalties—either monetary or criminal.”).

<sup>12</sup> See John L. Mikesell & Justin M. Ross, *Fast Money? The Contribution of State Tax Amnesties to Public Revenue Systems*, 65 N. TAX J. 529 (2012) (“Since 1980, 45 states plus the District of Columbia have conducted at least one formal tax amnesty program; all but 11 of these have run more than one program, certainly casting doubt on the claims sometimes made by the

known that those who commit crimes demonstrate a tendency to do so again, often being referred to as “repeat offenders.”<sup>13</sup> These repeat offenders in the criminal world usually face serious consequences for their actions.<sup>14</sup> However, tax amnesty programs almost always universally welcome all taxpayers, even those who previously demonstrated non-compliance in their tax filing and/or their payment practices.

As a remedial measure, this analysis advocates that tax amnesty programs embrace a simple participation qualification: Taxpayers could seek amnesty to “cleanse” their tax record; thereafter, however, the taxpayer would be barred from subsequent tax amnesty participation offered by the same taxing jurisdiction involving the same type of tax. In short, participation in any tax amnesty program would be a one-time opportunity.<sup>15</sup>

To support this policy, Section II presents background on this issue. Next, Section III analyzes the problem of recidivism and its implications. Section IV then advocates that tax amnesty programs grant one-time access. Finally, Section V concludes.

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states that the program offers a “one-time opportunity” for an honest, new start with the tax authorities.”); Elliott Uchitelle, *The Effectiveness of Tax Amnesty Programs in Selected Countries*, 48 FED. RES. BANK OF N.Y. Q. REV. 51 (1989) (noting that due to the number of repeated tax amnesties that India offered, many taxpayers likely held back participating, thinking that there was a good possibility that “the government would offer other, possibly more attractive, amnesties in the future”); James Alm, Jorge Martinez-Vazquez & Sally Wallace, *Do Tax Amnesties Work? The Revenue Effects of Tax Amnesties During the Transition in the Russian Federation*, 39 ECON. ANALYSIS & POL’Y 253 (2009) (explaining that Russia’s tax amnesty failure was due in large part to the fact that it had offered repeated amnesties).

<sup>13</sup> See, e.g., Nat’l Comm’n on Restructuring the Internal Revenue Serv., *A Vision for a New IRS*, 123 DAILY TAX REP. (BNA) L-5 (June 26, 1997) (reporting the recommendation of a blue-ribbon commission that the IRS “use technology to tailor compliance programs that target repeat offenders”).

<sup>14</sup> See, e.g., Thomas R. Goots, *A Thug in Prison Cannot Shoot Your Sister*, 28 AKRON L. REV. 253, 255 (1995) (“Habitual criminal statutes have existed in this country since the late 1700’s. They have been part of criminal law since as early as the 17th century.”); Franklin E. Zimring, *Populism, Democratic Government, and the Decline of Expert Authority: Some Reflections on “Three Strikes” in California*, 28 PAC. L.J. 243, 244 (1996) (“Penal laws that provide aggravated penalties for recidivist offenders have a long history in the Anglo-American legal system.”).

<sup>15</sup> For analysis of a variant on this proposal, see Justin M. Ross & Neal D. Buckwalter, *Strategic Tax Planning for State Tax Amnesties: Evidence from Eligibility Period Restrictions*, 41 PUBLIC FINANCE REV. 275 (2013) (“Accounting consultants often advise their clients to not immediately self-report if they discover they hold a nexus in a particular state, but rather to look for amnesty opportunities. It is possible that this concern leads states, at least in some of their attempts, to exclude the recently delinquent from being eligible for the amnesty. If states wish to deter strategic tax planning and maintain constant revenue collections, then excluding new delinquents appears to be a successful strategy.”)

## II. BACKGROUND

The notion of an “amnesty” has a commonly accepted meaning that has withstood the test of time.<sup>16</sup> It means an “official pardon.”<sup>17</sup>

Outside the tax context, governments often grant amnesties to groups of people who have committed societal transgressions (typically criminal in nature).<sup>18</sup> Why are governments willing to manifest such magnanimity when important pillars of society are being or have been threatened? As articulated by one commentator, the reason is often because “forgiveness will further the public welfare more than punishment.”<sup>19</sup> Yet, on the basis of retribution, amnesties sometimes frustrate those citizens who want perpetrators to be brought to justice and to face the consequences of their actions.<sup>20</sup>

The manner in which governments orchestrate amnesties generally follows a pattern and tax amnesties are no exception. A governmental body will announce the amnesty program as a policy of forgiveness for individuals who have previously violated the law; once the offer to participate is made, those who have been derelict can opt to participate or not; and those participating in the amnesty are welcomed back among the law-abiding, or, at the very least, their

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<sup>16</sup> See Justin M. Ross, *Forgiveness Is Divine, But Is It Good Tax Policy?*, SPEA INSIGHTS (2012), available at [https://oneill.indiana.edu/doc/research/ross\\_good\\_tax\\_policy.pdf](https://oneill.indiana.edu/doc/research/ross_good_tax_policy.pdf) (“The details of the oldest known tax amnesty program dates to Egypt circa 200 B.C., and this program’s record remains one of the British Museum’s most famous attractions by virtue of its inscription upon the Rosetta Stone.”); [need to review citation format for the following] Herman B. Leonard & Richard J. Zeckhauser, *Amnesty, Enforcement, and Tax Policy*, 1 TAX POL’Y & ECON. 55, 58 (1987) (“In Biblical times, some [amnesties] were even regularly scheduled. The Old Testament refers to jubilee years, at half-century intervals, in which debtor slaves were to be freed and ‘alienated property’ was to be returned to its rightful owner. See Leviticus 25:8-34.”).

<sup>17</sup> See, e.g., Leo P. Martinez, *Federal Tax Amnesty: Crime and Punishment Revisited*, 10 VA. TAX REV. 535, 540 (1991) (“More simply, amnesty is the official act of overlooking a crime which was committed by a group of people.”).

<sup>18</sup> One of the most famous amnesties was that offered by President Andrew Johnson with respect to Confederate soldiers. See Andrew Glass, *All Confederate Soldiers Gain Presidential Pardons, Dec. 25, 1868*, POLITICO (2018), available at <https://www.politico.com/story/2018/12/25/this-day-in-politics-dec-25-1868-1074077> (“The president extended ‘unconditionally, and without reservation . . . a full pardon and amnesty for the offence [sic] of treason against the United States, or of adhering to their enemies during the late Civil War, with restoration of all rights, privileges, and immunities under the Constitution and the laws.’”).

<sup>19</sup> See Martinez, *supra* note 17, at 540.

<sup>20</sup> See, e.g., Andrew B. Friedman, *Transitional Justice and Local Ownership: A Framework for the Protection of Human Rights*, 46 AKRON L. REV. 727, 739 (2013) (“Blanket amnesties present an obvious problem in that they are simply a promise not to achieve retribution against those who have perpetrated atrocity.”).

efforts acknowledged.<sup>21</sup> The time periods over which amnesties unfold vary tremendously, some lasting a few weeks<sup>22</sup> and others much longer.<sup>23</sup> For example, The General Amnesty Act of 1872 granted permanent immunity to most Confederate soldiers and others who had participated in the Civil War.<sup>24</sup>

Of all the types of amnesties that exist, few appear to have the popularity that those in the tax realm enjoy. Worldwide, at any given time, there is almost always at least one government promoting a tax amnesty.<sup>25</sup> Based on the general notion that granting amnesty for criminal and civil transgressions yields societal good that outweighs attempts to mete out punishment,<sup>26</sup> tax amnesties have been instituted on a regular and recurring basis.

There are four common objectives that most tax amnesties are designed to achieve:

- (1) to place additional taxpayers on the tax rolls in order to improve future compliance;
- (2) to speed up collections;
- (3) to create data concerning patterns of taxpayer noncompliance and to identify specific areas where enforcement reforms are necessary; and
- (4) to act as a lightning rod to capture public attention around programs, in order to ease the transition to increased enforcement following the amnesty.<sup>27</sup>

Underlying these four objectives is the primary goal of increasing tax revenues, both short-term and long-term.

However, for several reasons, tax amnesties are seldom a panacea to rectify all of the tax compliance woes that a particular government faces. First, some commentators consider them fundamentally unfair because they enable taxpayers to display, even flaunt, their noncompliance with impunity.<sup>28</sup> Second, the amount of revenue that tax amnesty programs generate is ordinarily

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<sup>21</sup> See generally Gerald P. Moran, *Tax Amnesty: An Old Debate as Viewed from Current Public Choices*, 1 FLA. TAX REV. 307 (1992); Allen H. Lerman, *Tax Amnesty: The Federal Perspective*, 39 NAT'L TAX J. 325 (1986).

<sup>22</sup> For example, New Jersey recently offered a tax amnesty program over an eight-week period. Kelly Phillips Erb, *New Jersey Launches Extensive Tax Amnesty Program*, FORBES (2018), available at <https://www.forbes.com/sites/kellyphillipserb/2018/11/15/new-jersey-launches-extensive-tax-amnesty-program/#149904341e01>.

<sup>23</sup> See Mikesell & Ross, *supra* note 12, at 535–38 (listing the time variations between and among states in terms of how long their tax amnesty periods extended).

<sup>24</sup> General Amnesty Act of 1872, Act of May 22, 1972, ch. 193, 17 Stat. 142.

<sup>25</sup> For example, in 2020 and 2021, at least three states – Nevada, North Carolina, and Washington – had tax amnesty programs in place. William Perez, *3 State Tax Amnesty Programs in 2020*, THE BALANCE (2020), <https://www.thebalance.com/state-tax-amnesties-3193354>.

<sup>26</sup> See *supra* note 19 and accompanying text.

<sup>27</sup> Bonnie G. Ross, *Federal Tax Amnesty: Reflecting on the States' Experiences*, 40 TAX LAW. 145, 152 (1986).

<sup>28</sup> See Martinez, *supra* note 17, at 565–66 (“A tax amnesty, by excusing civil and criminal penalties for avoidance of tax obligations, effectively severs the relationship between crime and



quite small, seldom more than a few percentage points of recurring government revenues.<sup>29</sup> Finally, of perhaps most importance, tax amnesties can have negative long-term implications if honest taxpayers lose faith in the tax system and decide to adopt the habits of the noncompliant.<sup>30</sup>

Despite the real and perceived shortcomings associated with tax amnesties, they have been omnipresent during the course of the past century in the United States. Consider their salient attributes at the state and federal levels, respectively.

#### A. State Tax Amnesty Programs

States impose a wide and varying range of taxes, such as income, sales, and excise taxes.<sup>31</sup> While many taxpayers are compliant, a significant number fail to comply with their obligations across a broad spectrum of taxes. For those taxpayers falling into the latter category, state governments have routinely turned to tax amnesty programs.<sup>32</sup>

State tax amnesty programs vary tremendously: Some state legislatures offer them over short time periods and others over extended time periods;<sup>33</sup> some programs pertain to one tax only

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punishment and compromises the fairness of the tax system. This effect should not be taken lightly.”).

<sup>29</sup> See Ross, *supra* note 16 (“While amnesties have high absolute levels of collections, they rarely represent anything more than just a fraction of annual tax collections. On average, an amnesty recovers just 0.70 percent of the tax revenue collected in the previous year.”).

<sup>30</sup> See, e.g., Hari S. Luitel & Russell S. Sobel, *The Revenue Impact of Repeated Tax Amnesties*, 27 PUB. BUDGETING & FIN. 19 (2007) (noting that “repeated tax amnesties appear to reduce state revenue collections”); Ronald Fisher, John H. Goddeeris & James C. Young, *Participation in Tax Amnesties: The Individual Income Tax*, 42 NAT’L TAX J. 15, 15 (1989) (noting that “a significant percentage of those who participated in Michigan’s tax amnesty program did not remain tax compliant.”); James Alm, Michael McKee & William Beck, *Amazing Grace: Tax Amnesties and Compliance*, 43 NAT’L TAX J. 23 (1990) (observing lackluster post-amnesty tax compliance); James Alm & William Beck, *Wiping the Slate Clean: Individual Response to Tax Amnesties*, 57 S. ECON. J. 1043 (1991) (same); James Alm & William Beck, *Tax Amnesties and Compliance in the Long Run: A Time Series Analysis*, 46 N. TAX J. 53 (1993) (same).

<sup>31</sup> For a broad range of the types of taxes many states impose, see, e.g., State of Tennessee, Department of Revenue, <https://www.tn.gov/revenue/taxes.html> (listing 23 types of taxes the state imposes); State of California, California Tax Service Center, <https://www.taxes.ca.gov/> (providing a somewhat similar, but shorter list).

<sup>32</sup> See Jason A. Bremer & Belinda S. Morgan, *States Adopt a Profitable ‘Carrot and Stick’ Approach to Tax Amnesty*, 14 J. MULTISTATE TAX’N 6, 8 (2004):

As a growing number of states suffer large fiscal deficits and depleted cash flows, state legislatures are increasingly turning to tax amnesty programs as a means of immediately pumping much-needed cash into their state treasuries. Over the last 20 years, 40 states and the District of Columbia have instituted tax amnesty programs in efforts to improve their financial and budgetary troubles.

<sup>33</sup> See *supra* notes 22 and 23 and accompanying text.

(e.g., income tax),<sup>34</sup> and others a range of different taxes (e.g., income, corporate, and sales and use taxes);<sup>35</sup> and, finally, some waive interest and penalties, and others do not.<sup>36</sup> While these programs differ in nature and scope, there are certain amnesty program attributes that commentators consider optimal, including:

- (1) they should be accompanied by reform that will discourage evasion in the future;
- (2) they should be accompanied by greater post-amnesty enforcement;
- (3) they should be offered only once;
- (4) they should minimize perceptions of unfairness by being foreclosed to known tax evaders and waiving few penalties, ideally only criminal prosecution; and
- (5) they should not be relied upon principally to raise revenue.<sup>37</sup>

Measured by several previously enumerated metrics (e.g., revenue collection and adding taxpayers to the tax rolls), state tax amnesty programs have sometimes proven moderately successful. Evidence of their accomplishments manifests itself in the sheer number of tax amnesty programs that exist at any one time, routinely sprinkled throughout the states.<sup>38</sup>

Consider a recent case study in which the state of New Jersey instituted a wide-reaching tax amnesty program.<sup>39</sup> Rather than raise taxes or cut governmental spending, Governor Phil Murphy offered a two-month window (November 15, 2018 – January 15, 2019) for taxpayers to come forward and pay back income, sales and use, and corporate taxes, plus interest on the taxes owed. In those instances when taxpayers participated, the state waived penalties; however, in those instances when taxpayers did not participate and were audited, the state sought to impose standard

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<sup>34</sup> See, e.g., *Use Tax Amnesty Program Calls for Full Reporting but Only Partial Payment*, 16 J. MULTISTATE TAX'N 34, 34 (2006) (“Maine is the latest state to offer a tax amnesty program, this one specifically for use tax.”).

<sup>35</sup> See, e.g., *Connecticut and Pennsylvania Implement Amnesty Programs*, J. OF MULTISTATE TAX'N & INCENTIVES, 1995 WL 1564516, at 1 (Connecticut enacted an amnesty program that extended “to personal income, sales and use, corporation and business services, liquor, and other state taxes. . . .”).

<sup>36</sup> See, e.g., Bremer & Morgan, *supra* note 32, at 8 (“Taxpayers participating in Virginia’s amnesty program were required to pay the entire tax owed but only half of any interest otherwise due on their outstanding tax liabilities. The remaining interest and any penalties were waived.”).

<sup>37</sup> See Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 518 (2012), citing to Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 701-05 (2007) (this four-prong criteria statement applies universally to all amnesty programs, including those offered at the federal and state levels).

<sup>38</sup> See Ross, *supra* note 16, at fig.1. For more recent lists, see the list of state tax amnesty programs available at the website of the Federation of Tax Administrators, available at <https://www.taxadmin.org/state-tax-amnesty-programs>, and at the website of the Multistate Tax Commission, available at <http://www.mtc.gov/Nexus-Program/State-Tax-Amnesties>.

<sup>39</sup> Treasury News Release, State of New Jersey Launches Tax Amnesty Program (Nov. 16, 2018), available at <https://www.state.nj.us/treasury/news/2018/news11162018a.shtml>.

penalties plus an additional 5 percent levy.<sup>40</sup> The legislative goal was to raise \$200 million.<sup>41</sup> Due to widespread publicity and the threat of an additional penalty, the program proved resoundingly successful, raising nearly 50 percent more revenue than was originally anticipated.<sup>42</sup>

Note that in addition to but different from periodic tax amnesties, many states offer what are commonly referred to as *voluntary disclosure programs* (or VDPs).<sup>43</sup> Unlike tax amnesty programs, which are typically available to all taxpayers and often cover all types of taxes, state VDPs may be available only to specific individual and business taxpayers whose revenue-generating activities in the state may have gone unnoticed by the tax department. For example, state VDPs may be attractive to those involved in specific types of retail sales activities that involve sales and use tax collections, in which taxpayers who have failed to follow proper registration protocols are able to pay previously unpaid tax liabilities without penalties but often with associated interest payments. Notably, unlike tax amnesty programs, state VDPs are usually offered on a continuous or permanent basis, with no specific and limited periods for participation, and their program contours often vary significantly by state.<sup>44</sup> In the end, participating taxpayers

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<sup>40</sup> See Erb, *supra* note 22 (“But for those who don’t participate, things can turn grinchy: Taxpayers who do not participate will incur a 5% penalty that cannot be waived or abated. This is in addition to all other penalties, interest and other costs.”).

<sup>41</sup> Samantha Marcus, *N.J. Tax Scofflaws Coughed Up at Least \$200M During Amnesty*, N.J.COM (2019), available at <https://www.nj.com/politics/2019/01/nj-tax-scofflaws-coughed-up-at-least-200m-during-amnesty.html>.

<sup>42</sup> Emily Bader, *Tax Amnesty Program Replenishes \$282M in State Revenue*, ROI-NJ.COM (2019), available at <https://www.roi-nj.com/2019/04/15/finance/tax-amnesty-program-replenishes-282m-in-state-revenue/>.

<sup>43</sup> Many states have instituted voluntary disclosure programs, *see, e.g.*, State of New Jersey, Division of Taxation, <https://www.state.nj.us/treasury/taxation/voldisc.shtml> (detailing the (i) benefits of voluntary disclosure; (ii) general eligibility guidelines, and (iii) application process); State of California, California Department of Tax and Fee Administration, <https://www.cdtfa.ca.gov/taxes-and-fees/use-tax-in-state-voluntary-disclosure.htm> (same); State of New York, Department of Taxation and Finance, <https://www.tax.ny.gov/enforcement/vold/> (same).

<sup>44</sup> See, *e.g.*, Arvinder Kaur & Corey L. Rosenthal, *Multistate Tax Commission Announces Voluntary Disclosure Program for Online Marketplace Sellers*, THE CPA JOURNAL (2017), available at <https://www.cpajournal.com/2017/08/29/multistate-tax-commission-announces-voluntary-disclosure-program-online-marketplace-sellers/> (“The program seeks to induce remote sellers who use a “marketplace provider/facilitator,” such as Amazon’s “Fulfillment by Amazon” program, to register and prospectively begin collecting sales tax in participating states. In exchange, the 18 participating states will waive all past penalties, and most will waive all tax liabilities and interest as well.”); Nicholas Fiore, *State Voluntary Disclosure Programs*, J. OF ACCOUNTANCY (2000), available at <https://www.journalofaccountancy.com/issues/2000/sep/statevoluntarydisclosureprograms.html> (“Under a voluntary disclosure agreement, a company typically agrees to register and pay its current and future taxes. Most states, in addition, insist that the company pay tax and interest for a minimum number of open back years (the lookback period). The majority of them forgive all civil

often enjoy similar financial benefits under either type of program (i.e., tax penalties are either waived or reduced), but state VDPs often do not present the same recidivism issues associated with tax amnesty programs for one simple reason: once taxpayers “come clean” (i.e., register to report tax in a particular state) and commence reporting, there is no need (or opportunity) for them to come forward a second time to do so again.

### B. *Federal Tax Amnesty Program*

To date, the federal government has not instituted a formal tax amnesty program (at least by name). Instead, for over a century, it has offered what it has described as a voluntary disclosure program (the “federal VDP”).<sup>45</sup> While the particulars of this program have varied, it has essentially operated as follows: prior to taxpayers being investigated, they may approach the Internal Revenue Service (“Service”), acknowledge the problem (e.g., failure to report income, the deduction of a fictitious expense, or failure to file a necessary tax return), and then take remedial measures to correct the issue.<sup>46</sup> If taxpayers undertake these steps, the Service has published guidance that declares that those participating will not bear criminal liability, absolving them of any illegal wrongdoing.<sup>47</sup>

Close to two decades ago in 2003, the Service instituted a variation of the federal VDP program known as the Offshore Voluntary Disclosure Program (OVDP).<sup>48</sup> The Service began this program after the agency learned that taxpayers were using credit cards with offshore bank

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tax penalties during the lookback period and may forgive a portion of the interest. Most important, states usually agree never to audit tax years preceding the lookback period.”).

<sup>45</sup> See Ross, *supra* note 27, at 146–47 n.27 (1986):

In 1919, the Bureau of Internal Revenue adopted a policy of accepting offers in compromise of criminal liability in cases of voluntary disclosure. Approximately three weeks after its institution, however, the policy was amended to provide that offers in compromise of criminal liability would be considered, rather than automatically accepted, in voluntary disclosure cases.

<sup>46</sup> See, e.g., Joseph W. Burns & Murray L. Rachlin, *Should We Penalize Voluntary Disclosures?*, TAXES—THE TAX MAG. 39 (1950) (“The Bureau has stated that where a taxpayer voluntarily discloses his attempted tax evasion to proper Bureau officers before any investigation of him has commenced, it will not recommend criminal prosecution.”).

<sup>47</sup> See, e.g., Cono R. Namorato & Richard E. Timbie, *Voluntary Disclosure Policy: An Alternative to Legislative Amnesty*, 45th ANN. N.Y.U. INST. 38-3 (1986) (“The Treasury Department has followed some form of voluntary disclosure policy since 1919. The policy, which was never formalized by statute or regulation, was developed through various informal announcements by Treasury officials.”).

<sup>48</sup> For an excellent overview of the OVDP, see Lederman, *supra* note 37.

accounts,<sup>49</sup> hiding billions of dollars of unreported income offshore.<sup>50</sup> Because the Service knew that it lacked the necessary funds and resources to audit and prosecute all non-law-abiding taxpayers who parked unreported income offshore, it commenced a series of four additional OVDPs in which taxpayers could participate.<sup>51</sup> The financial penalties associated with program participation were steep, but participating taxpayers could once again know that they were no longer under threat of being criminally prosecuted.

Recently, in 2018 the Service commenced a new version of the federal VDP. Introduced via a pronouncement, it offers taxpayers a pathway to criminal absolution.<sup>52</sup> As has been true with other iterations of the program, the metaphoric “toll charge” associated with program participation is financially hefty. Over a six-year lookback period:

- in the case of tax return filers, it engenders (i) the imposition of a 75 percent fraud penalty upon the tax due in the year of the largest tax liability, plus (ii) a 20 percent accuracy-related penalty on all other years; and
- in the case of nonfilers, failure-to-file and -pay penalties are applied to the tax due.<sup>53</sup>

One possible problem with the current version of the program is that it vests Service examiners with tremendous latitude in deciding whether harsher penalties could apply,<sup>54</sup> a factor that may discourage taxpayer participation.

Over the years, in an effort to expand the Service’s approach beyond the federal VDP, policy experts inside and outside of Congress have strongly advocated that the federal government

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<sup>49</sup> See Paul Jensen & Pam Spikes, *Offshore Credit Card Records: Invasion by the IRS*, 29 INT’L TAX J. 59, 59 (2003) (“These John Doe summonses were designed to allow the IRS to secure information from a reasonably identifiable group—U.S.-based customers with credit card accounts in certain foreign countries—who may be using offshore bank accounts to evade U.S. taxes.”).

<sup>50</sup> See U.S. SENATE PERMANENT SUBCOMM. ON INVESTIGATIONS, OFFSHORE TAX EVASION: THE EFFORT TO COLLECT UNPAID TAXES ON BILLIONS IN HIDDEN OFFSHORE ACCOUNTS (2014), *available at* [https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20OFFSHORE%20TAX%20EVASION%20\(Feb%2026%202014,%20208-20-14%20FINAL\).pdf](https://www.hsgac.senate.gov/imo/media/doc/REPORT%20-%20OFFSHORE%20TAX%20EVASION%20(Feb%2026%202014,%20208-20-14%20FINAL).pdf) (“In 2008 and 2009, the Subcommittee held three days of hearings and released a bipartisan report examining how some tax haven banks were deliberately helping U.S. customers hide their assets offshore to evade U.S. taxes.”); Shu-Yi Oei & Diane Ring, *Leak-Driven Law*, 65 UCLA L. REV. 532 (2018) (describing a whole series of tax-related data leaks that often resulted in criminal prosecutions and politicians seeking legislative changes to enhance tax compliance).

<sup>51</sup> Jay A. Soled, *The IRS’s Voluntary Disclosure Program and the Need for Its Codification*, – GEORGIA STATE UNIV. L. REV. – (2021).

<sup>52</sup> I.R.S. Mem. (Nov. 20, 2018) (Control No. LB&I-09-118-014), *available at* <https://www.irs.gov/pub/foia/ig/spder/lbi-09-1118-014.pdf>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 4 (“In voluntary disclosures not resolved by agreement, the examiner has discretion to expand the scope to include the full duration of the noncompliance and may assert maximum penalties under the law with the approval of management.”).

consider instituting broad and far-reaching amnesty programs.<sup>55</sup> Indeed, there were several congressional bills introduced in the mid-1980s that endorsed the institution of such programs.<sup>56</sup> The debate on these bills raged along familiar lines. On the plus side, amnesty advocates pointed out potential revenue generation and the addition of new taxpayers to the tax rolls; on the minus side, amnesty critics claimed that such a program would raise anemic revenue and would have a detrimental effect on taxpayer morale and compliance going forward.<sup>57</sup> To date, the federal government has resisted instituting such a broad amnesty program.

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What this section of the analysis indicates is that tax amnesty programs in the United States—whether at the state or federal level—typically share similar traits and posit comparable goals. However, what these programs fail to take into account is the behavioral aspects of tax compliance, namely, that taxpayers who cheat on their taxes are apt to repeat their behavior, particularly if they think that they will not be caught or that another amnesty program will be forthcoming. The experience of the United States is not an isolated one: other countries around the world face the same trade-offs.<sup>58</sup> The next section of this analysis addresses the issue of recidivism and its relationship to tax amnesty programs.

### III. ANALYSIS OF AMNESTY PROGRAMS

Investigations conducted on amnesty programs and their short-term and long-term implications have been undertaken by academics, government officials, and others.<sup>59</sup> The research demonstrates both positive and negative aspects of amnesty programs. One fact, however, that needs little further investigation is the recognition that tax amnesty programs have become addictive to government officials: once offered, notwithstanding the claim that they represent a

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<sup>55</sup> For a broad overview of federal tax amnesty proposals, see Ross, *supra* note 27.

<sup>56</sup> *Federal Tax Amnesty: Has Its Time Come?*, 100 U.S. NEWS & WORLD REP. 16 (1986); *Revenue Sans Taxes: Congress Shifts Attention to Federal Tax Amnesty*, 30 TAX NOTES 916 (1986); *U.S. Budget: Talk of Tax Amnesty Sweeps Congress as Senate Panel Starts Work on FY 1987 Budget Plan*, DAILY TAX REP. LL-2, LL-3 (1986); Carol Douglas, *Is a Federal Amnesty the Answer to Our Deficit Problems?*, 30 TAX NOTES 711 (1986).

<sup>57</sup> See Douglas, *supra* note 56, at 711; *Hearing on S. 203 and S. 205 Before the Subcomm. on Taxation & Debt Mgmt. of the S. Comm. on Fin.*, 99th Cong., 1st Sess. 151 (1985) (statement of Dennis Ross, Deputy Tax Legislative Counsel, Department of the Treasury).

<sup>58</sup> See, e.g., Alm, Martinez-Vazquez & Wallace, *supra* note 12 (detailing how countries around the world experience this phenomenon).

<sup>59</sup> See, e.g., Fisher, Goddeeris, & Young, *supra* note 30 (presenting a comprehensive study of tax amnesties—both their advantages and disadvantages).

“one-time opportunity,” they are routinely repeated.<sup>60</sup> This is true at the state level, and indeed it is a worldwide phenomenon.<sup>61</sup>

Considering only state tax amnesty programs, most states that adopted a first amnesty program have continued to offer subsequent ones. According to the Federation of Tax Administrators, the most striking examples of this phenomenon are Louisiana (8 amnesties since its first amnesty was enacted in 1985), Massachusetts (7 amnesties since 1983), Arizona (6 amnesties since 1982), Connecticut (6 amnesties since 1990), New Jersey (6 amnesties since 1987), Alabama (5 amnesties since 1984), New York (5 amnesties since 1985), Oklahoma (5 amnesties since 1984), Rhode Island (5 amnesties since 1986), and Texas (5 amnesties since 1984).<sup>62</sup>

In general, amnesty programs are most favored by legislatures when certain conditions are met, including the following:

- the government is in immediate need of tax revenues;
- many otherwise ordinary citizens participated in illicit activity;
- the offense did not directly harm identified individuals;
- the offense is not chronic or linked to a pattern of other offenses; and
- enforcement of the avoided tax will be nearly impossible anyway.<sup>63</sup>

Since situations involving tax delinquencies often meet all five of these conditions, it is easy to understand the attractiveness of tax amnesty programs. Another reason that politicians relish their use is that their key attraction, at least from a political perspective, is almost immediately realized – namely, the receipt of additional revenue without the need to raise taxes – whereas the major associated cost of disadvantaging otherwise compliant taxpayers is borne by subsequent political administrations.<sup>64</sup>

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<sup>60</sup> See *Tax Amnesty*, FORBES (2002), available at <https://www.forbes.com/forbes/2003/0414/122sidebar.html#586f707f1973> (“Over the past two decades 39 states have offered amnesties, 17 more than once, according to the Federation of Tax Administrators.”); Luitel & Sobel, *supra* note 30 (“During the 1982 to 2003 period, twenty-seven states offered a ‘repeated’ tax amnesty (i.e., for a second or third time) to their residents.”).

<sup>61</sup> See Alm, Martinez-Vazquez & Wallace, *supra* note 12.

<sup>62</sup> See, the historical listing of state tax amnesties by the Federation of Tax Administrators, available at <https://www.taxadmin.org/state-tax-amnesty-programs> (describing the history of state tax amnesty programs). Only a few states have offered a single amnesty (Delaware, Georgia, Hawaii, Indiana, Minnesota, Nebraska, North Carolina, Oregon, South Dakota, and Washington), and even fewer states have never offered a general tax amnesty (Alaska, Montana, Tennessee, Utah, and Wyoming). Also, see, the Multistate Tax Commission, available at <http://www.mtc.gov/Nexus-Program/State-Tax-Amnesties> (describing the history of state tax amnesty programs); and Luitel & Sobel, *supra* note 30 (“over the last 21 years, 27 states offered tax amnesties for a second or third time.”).

<sup>63</sup> Herman B. Leonard & Richard J. Zeckhauser, *supra* note 16 at 59.

<sup>64</sup> *Id.* at n.9.

The repetition of tax amnesty programs, however, has important public policy implications. Delinquent taxpayers have no incentive to change their behavior and timely pay their taxes, if they can pay them late with little or no consequence. Moreover, by signaling to taxpayers that tax violations carry little or no sanction, repeated tax amnesties undermine the goal of deterring bad acts in the first instance. Further, repeated tax amnesties tacitly encourage recidivism. Consider the cyclical behavior pattern that taxpayers are apt to exhibit: because the very notion of amnesty presumes that those eligible have already violated established legal requirements, the repeated reductions of any punishment for such behavior reinforce this behavior, thus promoting further bad acts, rather than fostering tax compliance. Finally, the resulting revenue shortfall deprives governments of financial means to support important and critical programs.

In light of these concerns, Section A below examines how the criminal law system has historically viewed the issue of recidivism, and Section B sets forth how, in recognition of the prevalence of recidivism, politicians have sought to shape tax amnesty programs.

#### A. *Recidivism*

A common human characteristic is that we tend to repeat behavior.<sup>65</sup> Often, this may be beneficial, particularly insofar as good habits are concerned. For example, those who eat a healthful diet, exercise, read, and socialize regularly know this pattern well and can readily retrace their steps. Such repetition proves both enriching and efficient.<sup>66</sup>

However, as social scientists will attest, humans can also exhibit behavioral patterns that are counterproductive.<sup>67</sup> We can eat too much, engage in unhealthful habits (e.g., cigarette smoking), watch a lot of meaningless television, and spend hours immersed in distracting social media. Notwithstanding the shortcomings associated with such habits, and even though we know that these habits can be dangerous to our health, many people gravitate to behaviors that offer short-term gratification but have harmful long-term consequences.<sup>68</sup>

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<sup>65</sup> See generally Ian Newby-Clark, *We Are Creatures of Habit*, PSYCHOL. TODAY (2009), available at <https://www.psychologytoday.com/us/blog/creatures-habit/200907/we-are-creatures-habit>.

<sup>66</sup> See generally Bernard J. Luskin, *The Habit Replacement Loop*, PSYCHOL. TODAY (2017), available at <https://www.psychologytoday.com/us/blog/the-media-psychology-effect/201705/the-habit-replacement-loop>; see also Susan Weinschenk, *The Science of Habits*, PSYCHOL. TODAY (2019), available at <https://www.psychologytoday.com/us/blog/brain-wise/201904/the-science-habits> (“Because we can carry out a habit without having to think about it, it frees up our thought processes to work on other things. It’s a clever trick that our brains have evolved to make us more efficient.”).

<sup>67</sup> See generally Adi Jaffe, *Why Is It So Hard to Change Bad Habits?*, PSYCHOL. TODAY (2019), available at <https://www.psychologytoday.com/us/blog/all-about-addiction/201903/why-is-it-so-hard-change-bad-habits>.

<sup>68</sup> See generally Judson Brewer, *The Science Behind Bad Habits and How to Break Them*, PSYCHOL. TODAY (2019), available at <https://www.psychologytoday.com/us/blog/the-craving-mind/201908/the-science-behind-bad-habits-and-how-break-them>.



The impact of this human tendency for repeat behavior has important implications with regard to criminal activity. Criminals know that their actions are transgressions that often carry consequences ranging from modest sanctions such as public shame and the requirement to perform community service, to more serious penalties such as serving time in prison and paying stiff financial penalties. Notwithstanding these risks, a common trait among criminals is that they will keep repeating their illicit behavior until, at some point, they are caught, reprimanded, and punished.<sup>69</sup>

During the punishment phase, society often hopes for various positive results. In some cases, society seeks to rehabilitate the wrongdoer, to extract retribution from the transgressor, and to deter others from engaging in these same acts.<sup>70</sup> When it comes to amnesties, however, these programs do little to further these objectives. Rather, the punishment for tax violations is lessened or even eliminated. As a result, many argue that tax amnesties are counterproductive and allow recidivism to thrive.<sup>71</sup>

Statistics related to general criminal behavior support this claim. In virtually every sphere of criminal enterprise, those who break the law are the most likely candidates to do so again.<sup>72</sup> Indeed, the criminal law system anticipates this result, and, in an endeavor to stop the cycle, it imposes even harsher consequences on repeat offenders.<sup>73</sup>

While research on whether harsher penalties serve as a meaningful deterrent is decidedly mixed,<sup>74</sup> amnesties undermine the objectives that punishment – and particularly increased

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<sup>69</sup> See, e.g., Matt Clarke, *Long-Term Recidivism Studies Show High Arrest Rates*, PRISON LEGAL NEWS (2019), available at <https://www.prisonlegalnews.org/news/2019/may/3/long-term-recidivism-studies-show-high-arrest-rates/> (“Two reports on long-term recidivism among prisoners released from state and federal prisons showed very high [re-]arrest rates. The rate for state prisoners was 83% over a nine-year study period, while it was 39.8% for nonviolent and about 64% for violent federal prisoners over an eight-year period.”).

<sup>70</sup> See generally Martinez, *supra* note 17, at 566–83.

<sup>71</sup> *Id.*

<sup>72</sup> See Clarke *supra* note 69.

<sup>73</sup> See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 168 (2001): Another possibility might be to argue that the repeat offender’s current offense is more serious and thus deserving of harsher punishment because, in addition to the wrong intrinsic to the particular offense, he now displays a culpable lack of respect for the law. Not only has he again infringed his victim’s rights, he has closed his ears to the authoritative voice of the law as it spoke to him through his previous punishments.

<sup>74</sup> See, e.g., NAT’L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING THE CAUSES AND CONSEQUENCES 139 (2014):

Ludwig and Raphael (2003) find no deterrent effect of enhanced sentences for gun crimes; Lee and McCrary (2009) and Hjalmarsson (2009) find no evidence that the more severe penalties that attend moving from the juvenile to the adult justice system deter offending; and Helland and Tabarrok (2007) find only a small deterrent effect of the third strike of California’s three strikes law. As a

punishment for repeat offenders – seeks to achieve.<sup>75</sup> Wrongdoers are not deterred from repeating their offenses, suffer no retributive consequences, and are unlikely to be rehabilitated. Whatever goals might be achieved by imposing increasing harsher sanctions for repeat offenders are compromised. Furthermore, it is often asserted that punishing repeat offenders apparently satisfies society’s psychological need for distributive justice.<sup>76</sup> In other words, in the minds of many, if repeat offenders are truly incorrigible, then they should get their fair dues in the form of enhanced punishments. Constantly offering tax dodgers amnesty may undermine the public perception that those flaunting the rules deserve severe sanction.

## B. Responses to Recidivism

When it comes to tax amnesties, governments are not oblivious to the problem of promoting recidivism. In response, they have typically taken four measures: (i) issuing pseudo-edicts that a proposed amnesty will be offered only once; (ii) precluding persons with prior criminal records from participation; (iii) increasing post-amnesty delinquency penalties; and (iv) strengthening future enforcement.<sup>77</sup> All measures have the goal of minimizing recidivism. This analysis details each measure below.

A common mantra associated with tax amnesty programs is that they are a once-in-a-lifetime opportunity.<sup>78</sup> If that is the case, taxpayers who fail to take remedial measures now to set their records straight will not have the opportunity to do so later down the road. Upon hearing this declaration, risk-adverse taxpayers must carefully weigh the choice between taking their chances of not being caught or paying a financial price now for the privilege of securing a clean record going forward.

Some tax amnesty programs limit their availability to those taxpayers who had a momentary ethical lapse in fulfilling their civic duties and who now wish to make amends. A

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consequence, the deterrent return to increasing already long sentences is modest at best.

<sup>75</sup> See, e.g., Kieran McEvoy & Louise Mallinder, *Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy*, 39 J. OF LAW AND SOCIETY 410, 423 (2012) (“Leaving crimes ‘unpunished’, as arguably is the case with amnesties, is an anathema from ... a deterrence perspective.”).

<sup>76</sup> See *Parke v. Raley*, 113 S. Ct. 517, 521–22 (1992) (discussing the historical reasons why statutes punish repeat offenders more harshly than first offenders).

<sup>77</sup> See generally Adam Stuart Weinreb, *Tax Amnesty Programs and Voluntary Compliance Initiatives: A Way to Mitigate Declining State Revenues*, J. ACCT. (2009), available at <https://www.journalofaccountancy.com/news/2009/may/20091721.html>.

<sup>78</sup> See, e.g., Maurice Carroll, *Three-Month Tax Amnesty in State to Begin on Nov. 1*, N.Y. TIMES (1985), available at <https://www.nytimes.com/1985/10/02/nyregion/three-month-tax-amnesty-in-state-to-begin-on-nov-1.html> (regarding New York’s tax amnesty, the state tax commissioner, Roderick G. W. Chu, stated that “the rules of the game have changed” and that the amnesty would be “a once-in-a-lifetime opportunity”); Amelia Josephson, *What Is a Tax Amnesty*, SMARTASSET (2021), <https://smartasset.com/taxes/what-is-a-tax-amnesty> (“A tax amnesty is not a standing offer. It’s a one-time deal, often limited to a period of 30 or 60 days.”).

predicate to the entry of at least some tax amnesty programs is thus a record devoid of prior criminal convictions.<sup>79</sup> Taxpayers who otherwise have no criminal record aside from a tax-related dereliction can therefore participate.

State legislatures are not unaware of the fact that old habits are hard to break and that financial temptations to skirt tax obligations loom large. Tax amnesty participants know that they are turning themselves in based on their own recognizance, not as the result of being audited. On a going-forward basis, this reality may harden participants' mindsets that they can continue to be noncompliant and that their actions will be met with impunity. In recognition that this sentiment may lurk in the minds of taxpayers and in order to dissuade taxpayers from embracing it, government officials will often take an additional course of action. Specifically, along with instituting a tax amnesty program, they will stiffen future tax penalties and the sanctions for those that fail to come forward to claim the amnesty.<sup>80</sup> This action is an endeavor to make taxpayers who engage in a cost/benefit analysis think twice before going down the noncompliance path once again.

Finally, beyond increasing tax-related delinquency penalties, government officials also often strengthen tax enforcement agencies by bolstering their budgets.<sup>81</sup> With additional financial resources, tax compliance agencies may add auditing staff to their ranks and augment their capacities to detect noncompliance (e.g., increase their computer-data-mining abilities). Taking these measures can inspire public confidence in the tax authority, spur tax compliance, and potentially chill taxpayers' propensities toward recidivism.<sup>82</sup>

#### IV. PROPOSED REFORM

Although government officials have not been completely oblivious to the issue of recidivism when instituting tax amnesty programs,<sup>83</sup> critics of amnesties nevertheless claim that

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<sup>79</sup> See, e.g., William Perez, *4 State Tax Amnesty Programs in 2018*, BALANCE (2019), available at <https://www.thebalance.com/state-tax-amnesties-3193354> (“You were ineligible for the [Arizona tax amnesty] program if you had ever been under criminal investigation or the subject of criminal litigation. Convictions for tax crimes also disqualified you, and you would be ineligible if you had agreed to a resolution for your tax debt with the state.”).

<sup>80</sup> See Herman B. Leonard & Richard J. Zeckhauser, *Amnesty*, *supra* note 16 at 67 (1987) (“New [tax amnesty] legislation . . . had recently stiffened the penalties for evasion, permitted felony prosecution for some particularly flagrant evaders, allowed the Commonwealth to revoke the licenses of or cancel contracts with delinquents, and provided additional staff and enforcement resources (including new funds for computers to track delinquents more reliably).”).

<sup>81</sup> *Id.*

<sup>82</sup> See, James Alm, *What Motivates Tax Compliance?*, 33(2) J. OF ECONOMIC SURVEYS 353 (2019) (describing the lessons of research on the effects of government policies on tax compliance).

<sup>83</sup> In recognition of potential recidivism in the aftermath of offering a tax amnesty, at least some states have increased tax enforcement. See, Alm & Beck, *supra* note 30 (1991) (for general state practices following tax amnesties and their impact on revenues); and Alm & Beck, *supra* note 30 (for the specific policies of Colorado following its 1985 tax amnesty).

amnesties do severe harm to taxpayer morale when they are offered on a repeated basis. After all, critics contend, no one wants to be viewed as a tax-paying chump, and, if tax amnesties are always an available option, only those who are foolish would not choose this option for themselves.<sup>84</sup>

This section of the analysis examines the well-grounded concern that repeated tax amnesty programs undermine a tax compliance ethos. In response to this concern, Section A spells out a proposed reform measure, namely, limiting eligibility for participation to single amnesty (either without regard to tax type, or at least for the specific tax for which amnesty is sought); Section B details the implications associated with the institution of more limited amnesties; Section C describes variations on the one-time amnesty proposal; and Section D offers lessons learned.

#### A. *One-Time Option Reform*

The reform measure that this analysis advocates centers on restricting participation in a tax amnesty program. More specifically, a tax amnesty program could only be utilized by those taxpayers who had not previously participated in a prior one offered by the same governmental authority.

Consider a simple example. Suppose in 2018 the state of Louisiana offered a tax amnesty program for those taxpayers who had filed inaccurate income tax returns. If the state legislature later decided to offer another tax amnesty program that related to income delinquencies, say in 2022, then those taxpayers who participated in the 2018 tax amnesty program would be precluded from participating in the 2022 program.

Governmental bodies could formulate the proposed one-time option in a variety of fashions. In some instances, they could grant fairly broad latitude to taxpayers. To illustrate, governments could permit taxpayers who participated in an income tax amnesty program to partake in a subsequent amnesty for a different type of tax, such as sales and use tax. In other instances, a government might not wish to be so magnanimous, declaring that participation in a tax amnesty for one type of tax precluded subsequent utilization of any other amnesty for another type of tax.

One question that governments must resolve for business taxpayers is “Who is the taxpayer?” Individual taxpayers are just that—people who, for tax amnesty purposes, cannot easily

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<sup>84</sup> See Leonard & Zeckhauser, *supra* note 16 at 55 (“Current amnesties may have encouraged some citizens to believe that there will be future amnesties as well, reducing their incentives to keep current on their payments.”); see also Weinreb, *supra* note 77:

As reported by Tax Analysts in *State Tax Today*, Tennessee revenue Commissioner Reagan Farr called amnesty programs “gimmicks” and implied that amnesty could “reduce public respect for the tax laws.” . . . The article quoted a study . . . , which said that “there was widespread criticism from law-abiding taxpayers that frequent amnesty programs unfairly reward tax evaders,” and a fiscal note attached to an amnesty proposal in New Mexico, which said that “[f]requent amnesty periods may indirectly communicate a message to taxpayers that they do not need to comply with the Tax Administration Act because, potentially, another amnesty period may be approved. It is not known how frequent is too frequent.”

disguise themselves or masquerade as others. However, the same is not true of legal entities such as corporations and partnerships, which can change form, transfer assets, pass business operations to successor entities, etc., leading to the possible circumvention of the one-time-option limitation.

In general, this concern can be readily addressed. Governments can design amnesties in a manner that requires taxpayers (or their principals) that have the same Social Security number or employer identification number as a prior participant to demonstrate their eligibility or be precluded from participation in multiple programs. In the majority of cases, institution of this basic restriction should work well.<sup>85</sup>

Even for tax avoiders willing to spend additional time, effort, and energy to form a new business enterprise simply for the opportunity to participate in a potential future tax amnesty program, preventive measures are viable. Consider a hypothetical situation in which Taxpayer A owns all of the outstanding shares of Corporation X, the latter of which participates in Louisiana's aforementioned hypothetical 2018 tax amnesty program. Taxpayer A, knowing about the one-time limitation and seeking to keep his options open, decides to form another wholly owned corporation, say, Corporation Y, to be the successor to Corporation X and assume its business affairs. If Louisiana decides to offer a 2022 tax amnesty program, Taxpayer A's strategy may be realized insofar as Corporation Y, with its new and unique employer identification number, may be a candidate for participation.

However, state taxing authorities could develop amnesty applications that mandate disclosure of information regarding an entity's shareholders (for closely held businesses), members (for limited liability companies), or partners (for a partnership), and the authorities could also request the disclosure of predecessor entities. Furthermore, legislatures could adopt penalties for failure to make required disclosures that might include loss of eligibility and/or additional sanctions for transgressors.<sup>86</sup> Finally, if governmental legislative bodies notice that there are too many kindred folks like Taxpayer A, they could always institute a general anti-abuse rule to curb such practices.<sup>87</sup>

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<sup>85</sup> See, e.g., Luitel & Sobel, *supra* note 30, at 21 (noting that "broad-based tax amnesties should, at a minimum, be used only once.").

<sup>86</sup> See, e.g., I.R.C. § 6662(i) (in cases of nondisclosed noneconomic substance transactions, the applicable penalty is 40% rather than 20%).

<sup>87</sup> Trying to make the one-time option a national rule seems unduly restrictive and might prove logistically problematic as well. Many multistate businesses making difficult decisions about multi-jurisdictional tax reporting might be unduly punished by such a rule. Moreover, forcing a business to choose a single state amnesty program would tend to defeat the core objectives of amnesty, which include generating revenue and bringing new taxpayers "into the fold" of future tax compliance. Furthermore, taxpayer confidentiality laws would tend to restrict information exchange between states regarding participation in amnesty programs, and laws facilitating such information exchange would only serve to further deter an organization's participation in amnesty programs in the first place. Even if some acceptable information sharing protocols could be developed, they might require, tax officials being granted access to reams of historical data across all 50 states that could not be easily processed.

While taxpayers could participate in amnesties offered in different tax jurisdictions, they would not have this same latitude for amnesties offered in the same jurisdiction. Instead, if they elected to participate in an amnesty program, the proposed legislation would preclude their revisiting their choice. The rationale for this limitation is simple: to forgive one transgression constitutes an implicit acknowledgment of our human foibles; however, to forgive such behavior that occurs on a regular and repeated basis recognizes and even legitimizes this behavior as acceptable. Such legitimization is intolerable for a society that wishes to maintain compliance with its laws, tax and otherwise.<sup>88</sup>

### B. *Implications Associated with the Proposed Reform*

Like any policy reform measure, limiting tax amnesty program availability would have both advantages and disadvantages. In this case, the former greatly outweigh the latter.

From a tax policy perspective, the proposed reform would send important dual messages. It would signal that a temporary lapse of judgment is forgivable, which would inject a sense of humanity into what otherwise might be perceived as a callous and unforgiving tax system. By the

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<sup>88</sup> The long run consequences of such legitimization are central to numerous approaches that attempt to explain tax compliance specifically and overall compliance generally. Many researchers have offered varied perspectives:

- Doreen McBarnet suggests that people may choose to comply willingly (what she terms “committed compliance”), they may choose to comply unwillingly (“capitulative compliance”), they may take full advantage of the law in minimizing their taxes (“creative compliance”), or they may choose noncompliance. Doreen McBarnet, *CRIME, COMPLIANCE, AND CONTROL* (Burlington, VT: Ashgate/Dartmouth Publishers Ltd.) (2004).
- Valerie Braithwaite argues that individuals differ in their motivations to comply with tax law, and she identifies both positive (“deference”) and negative (or “defiance”) motivations. Valerie Braithwaite, *DEFIANCE IN TAXATION AND GOVERNANCE – RESISTING AND DISMISSING AUTHORITY IN A DEMOCRACY* (Cheltenham, UK and Northampton, MA: Edward Elgar Publishing) (2009).
- James Alm and Benno Torgler argue that a tax administration must pursue policies that fit into three “paradigms”: the traditional “*enforcement*” paradigm in which the emphasis is exclusively on repression of illegal behavior through frequent audits and stiff penalties; a “*service*” paradigm that emphasizes the role of government-provided services as considerations in tax compliance; and a “*trust*” paradigm that demonstrates the importance of morality, social norms, and ethics in compliance behavior. James Alm & Benno Torgler, *Do Ethics Matter? Tax Compliance and Morality*, 101(4) *JOURNAL OF BUSINESS ETHICS* 635 (2011).
- Erich Kirchler, Erik Hoelzl, and Ingrid Wahl explore the interaction between enforcement effort (“power”) and facilitation (“trust”) on the part of the tax authority via a “slippery slope” framework. Erich Kirchler, Erik Hoelzl, & Ingrid Wahl, *Enforced versus Voluntary Tax Compliance: The “Slippery Slope” Framework*, 29(2) *JOURNAL OF ECONOMIC PSYCHOLOGY* 210 (2008).

same token, it would also simultaneously indicate to members of the larger tax-compliant community that their efforts are not being overlooked, unappreciated, or taken for granted.

In terms of revenue collections, implementation of this proposal would likely result in a moderate influx of additional revenue. Beyond the amounts raised directly from participants' amnesty program filings, participating taxpayers would be better moored to the tax system going forward and more likely to comply, knowing that there will be no future opportunities to exploit another tax amnesty program. However, if a tax amnesty program participant who had previously failed to file tax returns decided to once again become noncompliant, the tax authorities would have a far better chance of detecting this dereliction of duty. At the same time, propelled in part by the proposed restriction on tax amnesty use, generally compliant taxpayers would be more likely to stay the course and be attentive to fulfilling their filing civic duties.

Still another virtue of the proposed reform is that it places a premium on equity and fairness. Many people make mistakes and, when confronted with complex tax codes and the challenges of tax compliance, errors abound. In such a context, sound public policy should encourage citizens to learn from mistakes, while making clear that if an individual does not learn from past mistakes, the consequences may be austere. Instituting a tax amnesty program and limiting its availability accounts for human fallibility, while at the same time recognizing our capacity to educate ourselves. A one-time tax amnesty is thus acknowledges our common humanity, both its bad and its good aspects.

The proposed reform restricting tax amnesty availability offers one final advantage: it places important responsibilities upon taxpayers to be civic-minded. Bear in mind that civil society only functions if taxpayers, together, pay their equitable share of taxes. If taxpayers fall short of fulfilling their obligations, they must be encouraged to comply or be reprimanded, or else the fiscal needs of those basic institutions (e.g., the justice system, fire and police departments, national parks, and roadways and other infrastructure) that our society requires would collapse. As previously pointed out, the word *amnesty* denotes a pardon or forgiveness for wrongdoing, and those participating in such programs are essentially acknowledging their guilt.<sup>89</sup> This acknowledgment, coupled with the one-time restriction, should both repair and strengthen the broken bonds between these taxpayers and society.

Furthermore, there is little sound policy basis (and none supported by the literature) for rejecting the proposal of limited amnesty. Indeed, the only viable complaint would seem to be that preventing repeat amnesty participation would reduce the short-term revenue generation opportunity that amnesties represent. However, there is strong evidence that repeat offenders generate only a fraction of the already modest revenues that amnesties raise.<sup>90</sup> As our analysis suggests, such minimal potential revenue gains from repeat offenders are more than offset by the benefits of a policy that will reduce (or at least not promote) such recidivist behavior in the first

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<sup>89</sup> See *Burdick v. United States*, 236 U.S. 79, 95 (1915) (“[A]mnesty releases recipients not from guilt but from the penalty imposed by law.”).

<sup>90</sup> See, e.g., the empirical evidence in Luitel & Sobel, *supra* note 30 and Fisher, Goddeeris, & Young, *supra* note 30.

place, while at the same time fostering a perception of fairness that will encourage greater long-term compliance among the broader populace at large.

### C. *Variations on the Proposed Reform*

While our analysis supports the conclusion that a one-time amnesty is preferable from a policy perspective, there are three possible variations of the proposed one-time reform measure that merit consideration, the details of which are amplified in the sections that follow.

#### 1. *Addressing Incurable Taxpayers*

The first variation pertains to taxing society’s so-called “tax incurables” – those taxpayers who can never seem to put their tax affairs in order or who are regularly tardy or careless in their submissions. Rather than outright precluding these taxpayers from participating in a tax amnesty program once they have done so in the past, state legislatures could, as a modification to the one-time proposal, institute a steep penalty scale for habitual derelicts.<sup>91</sup>

A simple example illustrates how this proposal variation would play out in practice. Suppose a taxpayer failed to submit California income tax returns for tax years 2015-2018. Suppose further that in 2021, California offered a tax amnesty program for delinquent filers and waives its normal maximum 25% tax delinquency penalty for late tax filing.<sup>92</sup> If California were to offer another tax amnesty program at a later period of time, it might consider imposing a progressive, “repeat participant” penalty structure such as the one set forth below, rather than allowing a full waiver (and with interest charges applicable at the standard statutory rate):

<u>Number of Amnesties Participations</u>	<u>Penalty Rate</u>
First	0%
Second	5%
Third	10%
Forth	15%
Fifth	20%

From the perspective of the state legislature, utilization of this graduated penalty scale sends a dual message to the taxpaying public: we welcome non-compliant taxpayers back into the taxpaying fold, but there is an increasing cost associated with habitual derelictions. This variation to the suggested one-time proposal is not novel in nature. To the contrary, a number of academic commentators have endorsed proposals of a similar nature;<sup>93</sup> furthermore, a number of states have

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<sup>91</sup> The introduction of this variation does not undermine the fundamental premise of this paper, namely, taxpayers should only be able to participate in a tax amnesty on a one-time basis. Rather adoption of this proposal variation would convey a slightly different, yet important, message: taxpayer amnesty participants can never participate in a tax amnesty program as favorable as any of those in which that they had previously in the past.

<sup>92</sup> Calif. Revenue and Taxation Code § 19131(a).

<sup>93</sup> See, e.g., Edward Fox & Jacob Goldin, *Sharp Lines and Sliding Scales in Tax Law*, 73 TAX L. REV. 181 (2019) (advocating the use of sliding scales in the Internal Revenue Code to produce more economically and behaviorally efficient outcomes).



instituted this sort of variation in the non-filing penalty provisions of their respective tax codes,<sup>94</sup> and, to some extent, the federal government has done so as well.<sup>95</sup>

## 2. *Dealing with “Redeemed” Taxpayers*

A second variation to the one-time amnesty proposal pertains to business taxpayers (e.g., partnerships, limited liabilities, and corporations) that have sought to turn over a new ethical leaf. Over time, some business enterprises transform themselves from being proverbial “bad apples” to model citizens in terms of legal compliance.<sup>96</sup> Often this is the result of some external event (e.g., revelations regarding a hazardous or unlawful product)<sup>97</sup> or internal change (e.g., forced resignation of the existing board of directors).<sup>98</sup> In recognition that business enterprises can undergo these transformative events and fundamentally reinvent themselves, state legislatures should be sensitive to these changes and consider taking this conversion factor into account. One

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<sup>94</sup> See, e.g., Calif. Revenue and Taxation Code § 19132 (a)(2)(B) (imposing an increasing penalty of 0.5 percent per month for each month applicable to taxpayers who do not pay their taxes on a timely basis (utilizing up to a maximum of 40 months to compute the penalty)).

<sup>95</sup> See, e.g., I.R.C. § 6656 (applies a penalty on late deposits of withholding and other taxes with Federal depositories, providing a sliding scale of sanctions at 2%, 5%, and 10%, depending on whether the deposit is five, fifteen, or more days late). Furthermore, with respect to its offshore voluntary disclosure program, each iteration of it resulted in imposing an increasing penalty percentage upon taxpayers who failed to act in a timely manner). See Soled, *supra* note 51 (detailing how with respect to each iteration, the IRS increased the penalty rate).

<sup>96</sup> A case study of this transformation process has been that experienced by Wells Fargo Bank. Once its defalcations regarding customer accounts were discovered (i.e., whereby it incentivized its employees to create millions of fraudulent savings and checking accounts on behalf of its clients), it took numerous steps to overhaul its practices. See, e.g., *Wells Fargo: What It Will Take to Clean Up the Mess* (2017), available at <https://knowledge.wharton.upenn.edu/article/wells-fargo-scandals-will-take-clean-mess/>:

Last fall, Wells Fargo agreed to pay \$185 million to regulators to settle charges of manipulating and creating false accounts in its Community Banking division. It fired 5,300 employees who were implicated, as well as the CEO and other executives. In late July, the bank admitted that it took out auto insurance on behalf of 570,000 car loan customers without telling them, resulting in higher payments and some vehicle repossessions. Its plan to make customers whole would cost \$80 million, plus any fines.

<sup>97</sup> See, e.g., Guilbert Gates, Jack Ewing, Karl Russell, & Derek Watkins, *How Volkswagen’s ‘Defeat Devices’ Worked*, NY TIMES (2017), available at <https://www.nytimes.com/interactive/2015/business/international/vw-diesel-emissions-scandal-explained.html> (“Volkswagen admitted that 11 million of its vehicles were equipped with software that was used to cheat on emissions tests.”).

<sup>98</sup> See, e.g., James Rufus Koren, *Wells Fargo Chairman, Two Directors to Step Down Amid Continuing Fallout from Sham Accounts Scandal*, LA TIMES (2017), available at <https://www.latimes.com/business/la-fi-wells-fargo-chairman-20170815-story.html> (describing the board of directors upheaval in the aftermath of the company’s mishandling of customer accounts).

way a state might acknowledge a business enterprise's renewed commitment to tax compliance is restoring its eligibility for tax amnesty, even when prior corporate management has already benefited from a prior program.

However, as might be expected, being able to identify those business enterprises that have undergone fundamental and transformative changes is a challenge. In the case of public companies, this might not be overly difficult to achieve through the use of certain default presumptions. For example, the definition of a potentially eligible company (i.e., one that was deemed not to have previously participated in a tax amnesty) could include those that have, say, appointed 70 percent or more new directors as compared to when the company previously secured tax amnesty. Also, in the public company realm there are independent third parties that calibrate a business's commitment to fulfill ethical responsibilities and mores.<sup>99</sup> State legislatures could empower tax enforcement authorities to consult these third-party reports in deciding whether petitioning business enterprises had undergone transformative changes and thereby could qualify for amnesty participation.<sup>100</sup>

Notwithstanding these proposed metrics to identify meaningful ethical changes, deciding when a business enterprise has undergone a fundamental transformation in compliance behavior would admittedly be difficult to discern, particularly as applied to non-publicly traded business enterprises.<sup>101</sup> State legislatures could address this concern by crafting legislation that would permit a petitioning business enterprise that had already participated in one tax amnesty program to apply for a waiver to participate in a subsequent program, predicated upon the organization presenting evidence anonymously of its changed compliance profile to state tax authorities, who would be vested with absolute discretion to determine whether qualification for an additional amnesty participation would be warranted.

### 3. *Considering a "Permanent Amnesty"*

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<sup>99</sup> See, e.g., Betty Moy Huber & Michael Comstock, *ESG Reports and Ratings: What They Are, Why They Matter*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (2017), available at <https://corpgov.law.harvard.edu/2017/07/27/esg-reports-and-ratings-what-they-are-why-they-matter/> ("Most international and domestic public (and many private) companies are being evaluated and rated on their environmental, social and governance (ESG) performance by various third party providers of reports and ratings. Institutional investors, asset managers, financial institutions and other stakeholders are increasingly relying on these reports and ratings to assess and measure company ESG performance over time and as compared to peers.").

<sup>100</sup> By way of example, third-party accounting firms routinely supply certified financial statements (including two-year audited balance sheets and a three-year audited statement of income and cash flows) to shareholders which are also submitted to the Securities and Exchange Commission for review. Rule 3-01 of Regulation S-X, 17 C.F.R. § 210.3-01 (2014) & Rule 3-02 of Regulation S-X, 17 C.F.R. § 210.3-02 (2014).

<sup>101</sup> The fact that a business enterprise wanted to become a tax-abiding citizen in and of itself should not be decisive in determining whether it sought to have a better moral fiber; this is because the fear of crippling tax penalties might be the true motivating force behind its amnesty participation decision.

A final variation on the one-time amnesty proposal would be for state legislatures to institute permanent amnesty programs somewhat akin to the existing federal voluntary disclosure program (*see supra* Section II.A). Permanent amnesty programs at the state level would permit taxpayers, prior to being investigated, to come forward, avoid criminal prosecution, and face reduced civil delinquency penalties.<sup>102</sup>

Permanent amnesty programs have their advantages and disadvantages. On the positive side of the ledger, at least in the short term, they can result in making program participants tax compliant, enhancing revenue collections, and rendering the tax system less threatening to taxpayers who seek to make amends.<sup>103</sup> On the negative side, some argue that they may undermine public confidence in the tax system, they may lead taxpayers who are not risk-adverse to cheat, and, in the long-term, they may diminish revenue collections, all without generating significant amounts of revenues.<sup>104</sup> In the realm of permanent amnesties, empirical evidence thus far is quite limited and mixed.<sup>105</sup>

Still, the use of permanent amnesty programs warrants further exploration. State legislatures should consider carefully the merits associated with their implementation, so that taxpayers are not exposed again to the empty and all-too-familiar phrase that a particular tax amnesty program was a “one-time, never-to-be-seen-again opportunity.”<sup>106</sup> If instituted, participation in a permanent amnesty program would be predicated upon meeting the following twofold criteria: first, the taxpayer would have to submit an application for tax amnesty prior to

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<sup>102</sup> Some states have begun on a periodic basis offering such programs (akin to the one offered by the IRS) that pertain to potential criminal liability. *See, e.g., Adam Stuart Weinreb, Tax Amnesty Programs and Voluntary Compliance Initiatives: A Way to Mitigate Declining State Revenues*, THE TAX ADVISOR (2009), available online at <https://www.thetaxadviser.com/issues/2009/jun/taxamnestyprogramsandvoluntarycomplianceinitiativesawaytomitigatedecliningstaterevenues.html>:

[A] growing number of states occasionally offer voluntary compliance initiatives (VCIs). Unlike general tax amnesty programs, which apply to a broad category of taxpayers and a wide range of taxes, VCIs target taxpayers involved in tax shelter transactions, such as reportable and listed transactions at the federal and state levels. As a result, VCIs are limited in their application and may not provide the same types of benefits available under the more general amnesty programs. Notably, VCIs enacted to date have provided taxpayers limited appeal rights in exchange for a waiver of penalties, something to consider given the significant sums at issue.

<sup>103</sup> *See, James Andreoni, The Desirability of a Permanent Tax Amnesty*, 45 J. PUB. ECON. 143, 144-45 (1991) (why a permanent tax amnesty would increase the efficiency and equity of the tax system).

<sup>104</sup> *See, Mikesell & Ross, supra* note 12 (“Indeed, a regression analysis of the effects of amnesty features on amnesty recoveries suggests that if states are aggressively pursuing revenue maximization, the factors they can modify that are most influential on revenues also compromise existing tax administration.”).

<sup>105</sup> *See, Andreoni, supra* note 103.

<sup>106</sup> *See, Leonard & Zeckhauser, supra* note 16 at 55.

the taxing authority informing the taxpayer that he/she/it were under audit investigation; second, no taxpayer who participated in the permanent amnesty program would be eligible to participate in it again (unless, of course, the state legislature had instituted the program in conjunction with one of the other variations discussed above).

#### D. *Lessons Learned*

While the specific features of the various state amnesty programs differ, there have been some common aspects of each of them. In general, state tax amnesties have applied to both domiciled and nondomiciled residents and businesses, lasted two to three months, and applied to unpaid taxes of all types, including individual income taxes.<sup>107</sup> Even so, there are also some notable differences across state tax amnesty programs: In some, known delinquents (with already identified tax amounts due) have not been allowed to participate; most states have waived some or all interest and/or penalties that had accrued on back taxes; a few have increased the penalty for tax evasion following the grace period; finally, a number of states have provided for greater funding for post-amnesty enforcement.<sup>108</sup> Even so, the short-term revenues generated by an amnesty are almost always small relative to overall government tax collections.

It is natural to ask how these many variations in specific tax amnesty features have affected the performance of the state programs, both in terms of the short- and long-term benefits. Most available evidence relates to the *short-term* effects. Empirical estimates consistently demonstrate that, while still modest, short-term revenues are higher for an amnesty that: (i) allows past evaders to participate; (ii) reduces interest payments on back taxes; (iii) increases post-amnesty criminal penalties; and (iv) escalates funding for post-amnesty tax enforcement.<sup>109</sup> Empirical work also reveals that repeated amnesties generate progressively smaller amounts of short-term revenues.<sup>110</sup>

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<sup>107</sup> See generally, Mikesell & Ross, *supra* note 12 (describing different state tax amnesty programs); Alm & Beck, *supra* note 30 (same).

<sup>108</sup> *Id.* Notwithstanding these differences, as emphasized earlier, one universal common denominator is that multiple tax amnesty offerings appear to be par for the course both here in the United States and abroad. John Hasseldine, *Tax Amnesties: An International Review*, 52(7) BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION 303 (1998); Elliott Uchitelle, *The Effectiveness of Tax Amnesty Programs in Selected Countries*, 14(3) FEDERAL RESERVE BANK OF NEW YORK QUARTERLY REVIEW 48 (1999).

<sup>109</sup> For U.S. experience, see Mikesell & Ross, *supra* note 12; Alm & Beck, *supra* note 30; for international experience, see James Alm, Jorge Martinez-Vazquez & Sally Wallace, *Do Tax Amnesties Work? The Revenue Effects of Tax Amnesties During the Transition in the Russian Federation*, 39(2) ECONOMIC ANALYSIS & POLICY 253 (2009); John Hasseldine, *Tax Amnesties: An International Review*, 52(7) BULLETIN FOR INTERNATIONAL FISCAL DOCUMENTATION 303 (1998); Elliott Uchitelle, *The Effectiveness of Tax Amnesty Programs in Selected Countries*, 14(3) FEDERAL RESERVE BANK OF NEW YORK QUARTERLY REVIEW 48 (1999).

<sup>110</sup> See, e.g., Luitel & Sobel, *supra* note 30.

The arguably more important, *long-term* effects of tax amnesty programs remain unclear. What evidence exists suggests the following outcomes:<sup>111</sup>

- an amnesty unaccompanied by enhanced post-amnesty enforcement efforts tends to result in lower tax compliance, mostly from those individuals who exhibited only moderate levels of compliance prior to the amnesty;
- individuals whose compliance behavior, without regard to the amnesty, is at either end of the spectrum – their practice is either to comply fully or not at all – are largely unaffected by the availability of an amnesty in terms of future compliance;
- the mere expectation of a future tax amnesty leads to lower tax compliance, again dominated by individuals with moderate levels of compliance prior to the amnesty;
- any backsliding by participants leading to a decline in post-amnesty compliance can be largely offset by increased penalties and audits following the amnesty; and
- the combination of an amnesty with increased enforcement is more effective in improving post-amnesty compliance than an equivalent increase in enforcement alone.

Both the short- and long-term effects of tax amnesty programs suggest three general conclusions.

First, tax amnesties typically generate only a small amount of additional short-term tax revenue. As a practical matter, amnesty revenues tend to be overstated. This suggests that a tax amnesty should not be viewed as a fiscal panacea. Multiple amnesties are even less successful in generating additional revenues, and they have perverse effects on voluntary compliance as taxpayers incorporate the expectation that future grace periods will occur.<sup>112</sup> Furthermore, most revenues collected in an amnesty generally come from those individuals with relatively small amounts of previously unreported taxes; hard-core evaders, or those who evaded large amounts of tax, typically do not exhibit high amnesty participation rates.<sup>113</sup> Consequently, the ability of an amnesty to coax such evaders onto the tax rolls seems small, which is part of the reason that amnesties rarely generate significant amounts of additional revenue.

Second, individuals or firms are more likely to participate only if a tax amnesty is accompanied by a significant change in the post-amnesty tax system, especially its enforcement features. More specifically, empirical evidence indicates individuals will not voluntarily admit past

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<sup>111</sup> See Alm, McKee, & Beck, *supra* note 30 (describing the long-term effects of tax amnesty programs); Benno Torgler & Christoph A. Schaltegger, *Tax Amnesties and Political Participation*, 33(3) PUBLIC FINANCE REVIEW 403 (2005) (same).

<sup>112</sup> See, e.g., Luitel & Sobel, *supra* note 30 (showing that “repeated tax amnesties appear to reduce state revenue collections”); and James Alm & William Beck, *Tax Amnesties and Tax Revenues*, 18(4) PUB. FINANCE Q. 433 (1990) (demonstrating theoretically that “amnesties can reduce compliance...if the taxpayer anticipates another future tax amnesty with little law enforcement.”).

<sup>113</sup> See, e.g., Fisher, Goddeeris, & Young, *supra* note 30) (presenting empirical evidence on the characteristics of individuals who participate in tax amnesties).

tax evasion in a tax amnesty unless they believe that tax enforcement will be increased following the amnesty. Often, an individual or business with unpaid tax liabilities has made the decision that the benefits of evasion (e.g., reduced taxes) exceed the costs (e.g., the risk of detection and punishment). If it appeared rational for taxpayers to evade taxes in the past, then in an unchanged environment it will seem rational for them to continue to evade taxes, even if a tax amnesty is enacted; accordingly, they will only participate in an amnesty and report past evasion to the authorities if they believe that audit and penalty rates will be increased.<sup>114</sup>

Third, and of most relevance for our main policy recommendation, citizens must believe that the amnesty is a one-time opportunity. To the extent that an amnesty is successful in raising revenues during and after the amnesty, citizens must believe the government when it states that the amnesty will not be repeated – the government must have credibility. This suggests that an amnesty should not be used as an emergency revenue-raising measure because this will only encourage further non-compliance in anticipation of the next revenue emergency. In addition, citizens must believe and must eventually see that the amnesty is accompanied by enhanced enforcement. At the very least, an amnesty should be part of a significant shift of the tax system and a reorganization of tax administration aimed at efficient and effective tax enforcement. In fact, if increased enforcement and reorganization are already planned by the tax authorities, then a tax amnesty can be an effective tool for easing the transition to a new, tougher tax regime. Such an amnesty offers several advantages: the amnesty generates some immediate tax revenue; individuals with past evasion are not locked into continued evasion; and the government both clears its ledgers of accounts receivables and adds the names of past evaders to its records. It is important, however, that individuals believe that improved enforcement will occur. It is especially central that individuals accept as “True” (with a capital “T”) that the amnesty is a one-time opportunity to report previously unpaid taxes.

## V. CONCLUSION

Tax amnesties are popular both in the United States and abroad.<sup>115</sup> When carefully implemented, their virtues often are believed to outweigh their shortcomings, which makes them a regular feature in the tax compliance arsenal of many government officials. However, tax amnesty programs have proven infectious: once governments tap into them, they crave repeat

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<sup>114</sup> There is evidence that voluntary compliance generally falls after an amnesty that is unaccompanied by greater audit rates, penalty rates, and taxpayer education programs. This decline is due to a variety of factors, notably taxpayer expectations of another future amnesty and nonparticipants’ feelings of unfair treatment of evaders. *See, e.g.,* Alm, McKee, & Beck, *supra* note 30 (observing declining post-amnesty tax compliance in some experimental conditions); and Alm & Beck, *supra* note 30 (demonstrating empirically the factors that determine amnesty revenues).

<sup>115</sup> *See* Craig M. Boise, *Breaking Open Offshore Piggybanks: Deferral and the Utility of Amnesty*, 14 GEO. MASON L. REV. 667, 695 (2007) (“As the use of tax amnesties around the world—as well as in the United States—has increased, so has the scholarship analyzing them.”).

performances.<sup>116</sup> This exacerbates the problem of taxpayer recidivism, often sapping tax amnesty programs of their virtues.

Rather than downplay or ignore the problem of taxpayer recidivism, legislative bodies should tackle it head-on. A central feature of all tax amnesty programs should thus be that program participants have one – and only one – opportunity to tap into society’s magnanimity and return to the realm of being tax compliant. Once taxpayers have availed themselves of the program’s opportunities, they would thereafter be estopped from doing likewise in any amnesty program offered by the same governmental body, at least for the same type of tax. While adopting this proposed reform would not alleviate all of the concerns voiced by tax amnesty program detractors, the central problem of recurring tax amnesty opportunities would be put to rest.

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<sup>116</sup> *Id.* at 708 (“[T]he negative consequences associated with amnesties tend to be magnified with each successive amnesty that is offered. Specifically, multiple amnesties greatly increase perceptions of unfairness, diminish the perceived seriousness of tax evasion, and distort incentives in a way that reduces tax compliance.”).