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## Never Let a Good Crises Go to Waste

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## Never Let a Good Crisis Go to Waste<sup>28</sup>



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Many decades ago I wrote about the inherent weakness of the all-too-common temporary or one-shot tax study commissions. “By the

time [their] recommendations work their way through the legislative process, a whole new set of problems will have emerged. Recent developments can easily overtake such recommendations and render them naive.”<sup>29</sup> Or useless. What is needed instead is imposing some kind of permanent management system on the process of tax reform planning. Unfortunately, the current crisis might underscore that warning.

The creation of a permanent state body — perhaps somewhat akin to Congress’s Joint Committee on Taxation — charged with protecting the integrity and intrinsic harmony of the state tax structure might reduce the frequency of piecemeal legislation and coordinate the different viewpoints of affected groups. This permanent body could undertake necessary research and analysis, educate a legislature about how the law is operating, evaluate alternatives, initiate proposals, and draft legislation more thoughtfully and carefully than is usually possible under time pressures, and, most importantly, proactively drive a debate rather than react to one.

And more to the point of the theme of these briefs, a permanent body can be ready to capitalize on a crisis with draft legislation, and its supporting documentation and rationale. A financial crisis of the type the states are encountering opens the door to structural tax reform. But if a state is starting anew, by the time the needed thorough and rigorous

background work and drafting take place, the risk is that the door might close.

Years ago Professor Michael McIntyre called for “institutionalizing the process of tax reform.”<sup>30</sup> As he knew only too well from his extensive consulting around the world, few government activities are as complex, or require such intense planning and coordination, as a successful tax reform.

The pandemic may expose the lack of this institutionalization. Most states seem to have no structural reform proposals that have been fully vetted and already drafted in the context of that state’s unique circumstances. And fully vetted drafts are the currency of the realm, help seize the initiative, drive the policy debate, and put opponents on the defensive. Hyperbolic rhetoric cannot trump a draft.

Instead, we are seeing ad hoc changes — often emotional rather than rational — reflecting politics more than policy, accompanied by too-hasty implementation. Unfortunately, there is the risk that political support for more promising structural reforms might evaporate before the difficult work of rigorous analysis can occur.

A few examples. A short time ago the inimitable Billy Hamilton chronicled the Foxconn travesty exposing the snookering of Wisconsin.<sup>31</sup> He also chronicled defects in Virginia’s corporate handouts.<sup>32</sup> Had a permanent commission been in place charged with providing a dispassionate and disinterested evaluation of incentives and approving only those that could survive a cost-benefit analysis, a state’s candy store might have been shut at the outset.<sup>33</sup> It is easier not to give taxpayers something they never had than

<sup>30</sup> McIntyre and Oliver Oldman, “Institutionalizing the Process of Tax Reform,” 15 *Harv. Int’l. L. J.* 399 (1974). Among his many other contributions, McIntyre was the founding editor of *Tax Notes International*. I dedicated the eighth edition of my casebook to this icon.

<sup>31</sup> Billy Hamilton, “Foxconn’s ‘Eighth Wonder of the World’ Is a Bust So Far,” *Tax Notes State*, Nov. 9, 2020, p. 591. The “so far” in his title seems unduly optimistic.

<sup>32</sup> Hamilton, “Virginia Reviews Its Tax Breaks and Faces a Universal Truth,” *Tax Notes State*, Oct. 5, 2020, p. 49. See also all the work done by Good Jobs First.

<sup>33</sup> I proposed such a permanent commission in the June Board Briefs: “Responding to COVID: How to Deal With Nearly \$100 Billion in Wasted Incentives,” *Tax Notes State*, June 22, 2020, p. 1405.

<sup>28</sup> Although widely associated with Rahm Emanuel, the saying may go back to Winston Churchill.

<sup>29</sup> Richard Pomp, “State Tax Reform for the Eighties: The New York Tax Study Commission,” 16 *Conn. L. Rev.* 925, 929-30 (1984).

to take it away once they have it.<sup>34</sup> Reports after the fact about the stupidity and wasteful largesse of corporate giveaways often fall on deaf ears no matter how loud the drumroll, even if the waste may approach \$100 billion.

As another illustration of the need to institutionalize tax reform, consider all the hand wringing and anguish over what a state should do about GILTI, section 965, and tax havens. The answer, as many would grudgingly concede, is worldwide combined reporting (WWCR).

A permanent commission could have had such legislation drafted in a state-specific context, including the knotty problem of factor representation, along with supporting documentation on revenue implications and underlying rationale with examples.

To be sure, there are academics and think tanks that have made the case for WWCR, but the devil is in the details. A fully vetted draft, prepared with the input of tax practitioners, can move the ball into the end zone; a proposal unhinged from draft legislation cannot.<sup>35</sup>

A permanent commission, knowing the local politics, can also anticipate siren calls for eliminating specific taxes, like the personal income tax, which are being flogged in Mississippi, West Virginia, and Louisiana. Knowing the likelihood that such proposals would be surfacing, a permanent commission could have run the necessary simulations and alternative scenarios, modeled the secondary and tertiary results, potential reductions in services, impact on equity, and the effects on economic development. All this takes time if done with the proper rigor needed to influence and affect public opinion. But if they were already done and ready to go, they might have been able to stop delusional proposals before they could take root.

The source of what many would view as my own delusional proposal (stay tuned) was the day I came out of Whole Foods with three bags

of groceries, totaling \$250. Sure, coffee picked on the mountaintops of Papua New Guinea was probably worth \$20 a pound. And the cheeses that looked like they were deported from France after being used in medical experiments were undoubtedly a critical purchase, as were those tiny Japanese mushrooms with unpronounceable names. Maybe the mushrooms would nicely complement the out-of-season, strange looking vegetables I could not resist; so unfamiliar that the cooking directions were glued onto their stalks (hopefully with edible organic glue).

What did these all have in common besides their not being necessary? They were exempt from the sales tax. I paid not a penny on these luxuries. To grant some relief to the poor, we exempt food for all, using a shotgun rather than a rifle approach.

And yes, I am calling for the taxation of food. And before you stop reading and write me off as having COVID brain, will you still laugh when I tell you the exemption costs California \$3.8 billion, Florida \$4.1 billion, New York \$1.4 billion, and Texas \$3.2 billion?<sup>36</sup>

Ultimately, all the exemption for food can do is relieve a tax that would otherwise be due;<sup>37</sup> it cannot address the root causes of poverty or food insecurity. A billion or more dollars for targeted programs and transfer payments can. I know this proposal in the midst of a pandemic is a heavy lift, but it would be less so if a permanent commission were in place, providing the background and rationale, the necessary revenue estimates, and a prepared state-specific draft. And retailers may well line

<sup>36</sup> My research assistant Sebastian Iagrossi, a candidate for the LL.M. in Taxation at NYU, developed these numbers from the tax expenditure reports compiled by the Institute on Taxation and Economic Policy. In the interests of disclosure, I am a member of the institute's board but had nothing to do with compiling these reports. I am always astonished that commentators calling for the exemption of food from the sales tax somehow fail to mention the figures in the text.

<sup>37</sup> I would not tax food sold by nonprofits. And like some states, I would provide a phased-out credit against the state's income tax to rebate the tax deemed paid on food. Purchases made with food stamps are already free of a state's sales tax under the Supplemental Nutrition Assistance Program (SNAP). I am well aware that SNAP has its weaknesses, as does the phased-out credit. I am also aware of the hoary saying that the "perfect is the enemy of the good." More to the point, both approaches would be supplemented by substantial new spending programs and transfer payments. These can easily offset existing weaknesses in the food stamps program and the phased-out credit.

<sup>34</sup> Hamilton puts it this way: "Like sales tax exemptions, [incentives are] easier to enact than to repeal." *Supra* note 32, at 54.

<sup>35</sup> See "State Tax Reform New York Style," in Proceedings of the 77th Annual Conference, National Tax Association — Tax Institute of America, 192 (1985); reprinted in: Steven Gold, *State Tax Study Commission: An Overview of Four Approaches* (1985).

up behind it as their compliance costs would be reduced, as well as their risk of audits and class action suits.

Heavy lift or not, it cannot be worse than the one-offs being discussed, calls for draconian cuts in spending, half-baked ideas proposals that can be easily thwarted or difficult to administer, the adoption of trailing nexus on steroids leading to border wars and possible Supreme Court intervention, or bills that have both policy and constitutional defects.<sup>38</sup>

Hopefully, it is not too late for structural reforms to take place, but the failure to institutionalize the process of tax reform may squander a crisis.

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<sup>38</sup> See Pomp, "Things Not Worth Doing Are Especially Not Worth Doing Poorly: The Maryland and Nebraska Taxes on Digital Advertising," *Tax Notes State*, Apr. 6, 2020, p. 39.