REPORT #913

TAX SECTION

New York State Bar Association

REPORT ON PROPOSED REGULATIONS FOR NEW YORK STATE
OFFERS IN COMPROMISE

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New York State Bar Association

October 2, 1997

The Honorable Michael H. Urbach
Commissioner
Department of Taxation and Finance
W. A. Harriman Campus, Building 9
Albany, New York 12227

Re: Report on Proposed Regulations for New York State Offers in Compromise

Dear Commissioner Urbach:

I am pleased to submit for your consideration the enclosed report commenting on the proposed regulations to implement the Commissioner's authority to compromise taxes under Section 171(fifteenth) of the New York State Tax Law. The principal authors of this report are Sherry S. Kraus, Kenneth Bersani and William J. Neild of the Committee on Individuals and Maria T. Jones of the Committee on New York State Franchise and Income Taxes.

The report commends the Department for the writing of regulations to improve implementation of the Commissioner's compromise authority under subdivision fifteenth. It notes that, in the past, the New York State Offer in Compromise program has been widely perceived by tax practitioners as a difficult and often futile process, in contrast to the federal Offer in Compromise program which has proved to be an increasingly effective procedure for resolving liabilities not likely to be collectible in full.

The report analyses the underlying enabling legislation for New York State Offers in Compromise and for federal Offers in Compromise and concludes that, while there are some differences between the federal and state enabling statutes, the fundamental objectives of the programs are the same. The report recommends incorporating into the proposed regulations selected portions of the federal Offer in Compromise guidelines to provide needed detail and guidance to taxpayers in making offers and to the Department in evaluating offers.

The report urges broadening the program, reflecting our belief that a fair and effective state Offer program will have the dual benefit of increasing collections to the state and giving tax debtors who cannot pay their full tax liability a fresh start toward future compliance with the tax laws. To that end the report suggests various ways in which the statutory requirement of taxpayer insolvency might be interpreted so as to make the program more accessible without impairing the discretion of the Department to reject offers in appropriate cases. The report also addresses various valuation issues and urges that a realistic approach be taken, similar to that used in the federal program.

Again we congratulate the Department on its effort to invigorate the Offer in Compromise program. If we can be of further assistance to you in the drafting of these important regulations, please let us know.

Yours very truly,

Richard O. Loengard, Jr.
Chair

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NEW YORK STATE BAR ASSOCIATION

TAX SECTION

REPORT ON PROPOSED REGULATIONS FOR NEW YORK STATE OFFERS IN COMPROMISE[1]

The Tax Section of the New York State Bar Association has been asked by the New York State Department of Taxation and Finance (hereinafter “Department”) to comment on the proposed regulations to implement the Commissioner's authority to compromise taxes under Section 171 (fifteenth) of the New York State Tax Law (hereinafter “subdivision fifteenth”). At present, the only regulations implementing the Department's authority to compromise taxes have been issued under Section 171 (eighteenth-a) (hereinafter “subdivision eighteenth-a”) which deals with the compromise of taxes in the limited period prior to the tax becoming finally and irrevocably fixed and no longer subject to administrative review.[2] Since there are substantial differences in the Commissioner's authority to compromise tax liabilities under subdivision eighteenth- a and subdivision fifteenth, the subdivision eighteenth-a regulations have been of limited usefulness in providing guidance to taxpayers and their representatives in submitting Offers in Compromise for tax liabilities under subdivision fifteenth.

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[1] The principal authors of this report are Sherry S. Kraus, Kenneth Bersani, William J. Neild and Maria T. Jones. Helpful comments were provided by Richard O. Loengard, Jr., Robert Wild, Parker Brown, Arnold Kapilof, Arthur Rosen, Eugene Vogel, James Locke, David Sachs, William Randolph and Robert H. Scarborough.

[2] 20 New York Code of Rules and Regulations (“20 NYCRR”) Part 5000.

We commend the Department for undertaking the writing of regulations under the Commissioner's potentially broader compromise authority of subdivision fifteenth. An effective Offer in Compromise program can lead to increased collections to the state and can restore tax debtors to future compliance with the tax laws.

In the past, the New York State Offer in Compromise program has been widely perceived by tax practitioners as a futile process. This perception is in stark contrast to the federal Offer in Compromise program which has proved to be an increasingly effective procedure for resolving liabilities not likely to be collectible in full. While there are some differences between the federal and state enabling statutes, we believe that the fundamental objectives are the same and that a well designed state Offer in Compromise program can work as well as its federal counterpart in achieving the mutual goal of collecting “what is potentially collectible at the earliest possible time and at the least cost to the government.”[3]

I. STATUTORY FRAMEWORK FOR OFFERS IN COMPROMISE

A. Federal Offers in Compromise.

The authority underlying the Internal Revenue Service's ability to compromise federal tax, interest and penalties derives from Section 7122(a) of the Internal Revenue Code, as amended, which provides as follows:

> The Secretary may compromise any civil or criminal case arising under the internal revenue law prior to reference to the Department of Justice for prosecution or defense; and the Attorney General or his delegate

[3] Internal Revenue Service Manual 57(10)1.1.

> may compromise any such case after reference to the Department of Justice for prosecution or defense.

While the treasury regulations implementing this compromise authority are very limited (i.e., less than two pages),[4] the Internal Revenue Service has developed extensive and detailed guidelines for the submission and evaluation of Offers in Compromise in its manual provisions. See Internal Revenue Service Manual 57(10), Offers in Compromise.[5] The policy underlying the federal Offer in Compromise program is stated as follows:

> The Service, like any other business, will encounter situations where an account receivable cannot be collected in full or there is a dispute as to what is owed. It is an acceptable business practice to resolve these collection and liability issues through compromise. Additionally the compromise process is available to provide delinquent taxpayers with a fresh start toward future compliance with the tax laws. IRM 57(10)(1).

B. New York State Offers in Compromise.

The authority of the Commissioner of Taxation and Finance to compromise state taxes, interest and penalties derives from Section 171 (fifteenth) and Section 171 (eighteenth-a) of the New York State Tax Law. Currently, the state has promulgated regulations only under subdivision eighteenth-a. Subdivision eighteenth-a authorizes the Commissioner to compromise tax liabilities in the limited timeframe “prior to the time the tax or administrative action becomes finally and irrevocably fixed and no longer subject to administrative review.” The regulations promulgated under subdivision eighteenth-a are contained in Part 5000 of Chapter VIII of 20 NYCRR.

[4] See Treas. Reg. Section 301.7122-1.

[5] Hereinafter, all references to this manual will be preceded by the abbreviation “IRM”.

Until now, however, regulations have not been proposed under the compromise authority of subdivision fifteenth. Under subdivision fifteenth, the Commissioner has the authority to compromise any tax, warrant or judgment if

> “the tax debtor has been discharged in bankruptcy, or is shown by proofs submitted to be insolvent, but the amount payable in compromise shall in no event be less than the amount, if any, recoverable through legal proceedings, and provided that where the amount owing for taxes, penalties and interest or the warrant or judgment is more than twenty-five thousand dollars, such compromise shall be effective only when approved by a justice of the supreme court.”

While the subdivision fifteenth compromise authority is limited to taxpayers who have been discharged in bankruptcy or are insolvent, the Commissioner’s authority under this provision has the potential for much broader application than the compromise authority under subdivision eighteenth-a since the compromise may be granted for taxes that have already become final and with respect to which warrants or judgments have been filed. In contrast, Offers in Compromise submitted under subdivision eighteenth-a are limited to taxes that have not yet become final and irrevocably fixed. The subdivision eighteenth-a authority has been useful as an alternative for settlement of disputed tax cases where issues of liability (and, therefore, hazards of litigation) as well as issues of collectibility, are a factor.[6]

However, the great majority of potential Offers in Compromise fall into the category of “final and irrevocably fixed” liabilities that are beyond the tax debtor's ability to pay. In most cases, tax warrants have been filed on these

[6] A liability can be compromised under subdivision eighteenth-a on the ground of “doubt as to liability” as well as the ground of “doubt as to collectibility”. 20 NYCRR Section 5000.1.

liabilities. For these tax debtors, the Commissioner's compromise authority under subdivision eighteenth-a offers no relief and they must make their case for compromise under subdivision fifteenth or not at all. Because of the larger number of tax debtors that will potentially seek relief under subdivision fifteenth, the regulations now under review have enormous importance in determining the success of the Offer in Compromise program in New York. Hence, we applaud the decision of the Department to publish regulations which will serve to effectuate the Offers in Compromise program.

II. SUMMARY OF PROPOSED REGULATIONS

The proposed regulations add to the existing regulations) a new Part 5005 entitled “Compromises Under Subdivision Fifteenth of Section 171 of the Tax Law”. Consistent with the underlying enabling legislation, the regulations provide for compromise of the liability on the single ground of “doubt as to collectibility”.[7] Significant features of the proposed regulations are as follows:

- The tax liability must be fixed and all protest rights exhausted prior to making an Offer in Compromise. Prop. Regs. Section 5005.1(a).

- The tax debtor must have been discharged in bankruptcy or shown, by proof, to be insolvent. Prop. Regs. Section 5005.1(b)(1).

[7] A federal Offer in Compromise can also be based on “doubt as to liability”.

- The amount acceptable in compromise cannot be less than the amount the Department could collect through legal proceedings. Id.

- The compromise amount “must equal or exceed the amount the Department would be able to collect, over a period of time, through legal proceedings” including the collection procedures set forth in Article 52 of the Civil Practice Law and Rules (hereinafter “CPLR”) that permit the seizure and sale of real and personal property, seizure of bank accounts and motor vehicles, levy of debts owed to the taxpayer by a third party and income executions of up to 10% of the taxpayer's gross wages. Prop. Regs. Section 5005.1(b)(3).

- “Trust tax liabilities” (e.g., withholding tax or sales and use tax)[8] cannot be compromised for less than the amount of outstanding tax due. Prop. Regs. Section 5005(b)(1).

- As a condition to accepting the Offer in Compromise, the taxpayer must submit a statement of financial condition. Prop. Regs. Section 5005(c)(2).

    - A taxpayer may be required to submit certified financial statements. Id.

- In addition to the Offer amount, a taxpayer may be required to enter into a collateral agreement, <u>i.e.</u>, pay

[8] We question the inclusion of use taxes within the category of “trust tax liabilities” since use taxes are imposed directly upon the purchaser. In contrast, persons required to collect and pay over sales taxes and employment taxes serve in a fiduciary role. New York State Tax Law Section 1133(a); 20 NYCRR Section 532.3.

over a fixed percentage of future earnings or other income for a specific period of time as an additional amount paid toward the Offer. Prop. Regs. Section 5005(c)(2)(i).

- The taxpayer must agree to give up all refunds and credits due through overpayments of tax for periods ending before or within the calendar year in which the Offer is accepted. Prop. Regs. Section 5005(c)(3)(i).

- The taxpayer must waive the running of the statute of limitations of collection of the tax for the period during which the Offer is pending or, if an installment payment of the Offer is made, for the installment payment period and for one year thereafter. Prop. Regs. Section 5005(c)(3)(iv).

- The taxpayer must remain current in all filings and payments and immediately pay in full any new tax assessment that may be issued for a period of five years from the date of acceptance of the Offer. Prop. Regs. Section 5005(c)(3)(v).

- The taxpayer is limited to making only one Offer in Compromise. Prop. Regs. Section 5005(c)(4).

- The Offer will be reviewed by the Tax Compliance Division which will recommend acceptance or rejection. Prop. Regs. Section 5005(d)(1). Upon receipt of a recommendation for acceptance of an Offer, the Commissioner will accept or reject the Offer and the Department will notify the taxpayer in writing of such action. Prop. Regs. Section 5005(d)(2)(i).

- If the amount to be forgiven is more than $25,000, any Offer recommended by the Department for acceptance must be referred to a justice of the Supreme Court for approval prior to the Commissioner's notification of acceptance. The Offer is not effective until approved by a justice of the Supreme Court. Prop. Regs. Section 5005(d)(2)(ii).

- Grounds for rejection of the Offer include:

    - Evidence of conveyance of assets for less than fair market value. Prop. Regs. Section 5005(e)(2)”(e)”.

    - Public policy reasons (i.e., not in the best interests of the State). Prop. Regs. Section 5005(e)(2) “(f)”.

    - The taxpayer has not demonstrated a good faith effort to repay/resolve the tax debt, i.e., where the taxpayer has displayed a wanton disregard for the tax debt over an extended period of time and disposed of significant assets and other holdings. Prop. Regs. Section 5005(e)(2)”(g)”.

- An accepted Offer in Compromise may be ruled by the Department as in default if the taxpayer does not comply with the conditions of the Offer (including requirements of future payment under a collateral agreement) and if there is evidence of a substantial misrepresentation of a material fact subsequent to the acceptance of the Offer. Prop. Regs. Section 5005(f).

- In cases of default, the Department may reimpose the full tax liability, including all interest and penalties, apply all amounts paid under the Offer and immediately, without notice, proceed to collection for the balance of the original liability. Id.

III. COMMENTS

A. General.

While the subdivision fifteenth enabling legislation allowing the compromise of state tax liabilities is not identical to the enabling language of Section 7122 of the Internal Revenue Code allowing the compromise of federal tax liabilities, the underlying policies of the statutes are fundamentally the same, i.e., permitting satisfaction of the tax debt at an amount less than full payment where the liability is unlikely to be collected in full. We also believe that the New York State subdivision fifteenth requirement that "the amount payable be no less than the amount recoverable through legal proceedings" is substantially the same as the Internal Revenue Service guideline requirement that "the amount offered reasonably reflects collection potential". IRM 57(10)1.1.

In essence, while there are some differences in the enabling legislation underlying the federal and state Offer in Compromise programs, the basic policy reasons underlying the state's ability to compromise a liability under subdivision fifteenth can reasonably be concluded to be the same as those underlying the federal Offer in Compromise program, to wit, (1) to resolve a tax liability receivable which cannot be collected in full; (2) to effect collection of what could reasonably be collected at the earliest time possible and at the least cost to the government; (3) to give taxpayers a fresh start to enable them to voluntarily comply with the tax laws; and (4) to collect funds which may not be collectible through any other means. IRM 57(10)1.2.

New York State has arguably even greater incentives than the federal government for putting in place an effective Offer in Compromise program. Unlike a federal tax debtor, a New York State tax debtor faced with a liability beyond his/her reasonable expectation of paying may defeat or stymie collection of that debt by moving out of (or staying out of) the state. While New York could attempt an extra-territorial collection against the tax debtor by use of its tax lien, or by levy in New York upon financial institutions which have branches in other states, this is a hit or miss process and assumes that the state can determine the whereabouts of the debtor.

Other reasons that the state can sustain losses in collections are (1) a lower assessment priority to that of the Internal Revenue Service and other creditors and (2) the statutory collection restrictions that limit access to the tax debtor's assets (e.g., pension plans are exempt from levy) and/or income (e.g., maximum 10% gross wage levy).

The greater vulnerability of the state to losses in collection heighten the importance of putting in place an effective Offer in Compromise program. A fair and effective Offer program not only will result in increased collections to the state but will give tax debtors who cannot pay the full tax liability an alternative to resolving their tax debts other than fleeing the state to escape collection.

Another factor in the need to provide an effective state Offer in Compromise program is the long period of collection which the state has to collect against the taxpayer. Under federal tax law, the statutory period for collection is ten years from the date of assessment unless Extended by agreement or judgment. IRC Section 6502. In contrast, under New York State law, a filed tax warrant empowers the department to use the collection procedures in Article 52 of the Civil Practice Law and Rules relating to enforcement of money judgments. This means that the tax collection period for levy of real property and personal assets and for use of income executions against wages extends for a period of twenty years after the date of assessment.[9]

The significantly longer collection period for New York State increases the potential of large uncollectible liabilities against taxpayers. Even a small unpaid tax liability can grow significantly over a twenty year period by accrual of interest and penalties. While some tax debtors may find relief in bankruptcy court for tax debts, many of the potentially largest tax debts, such as those for withholding and sales taxes, cannot be discharged in bankruptcy. 11 USC Section 507. Without relief from an Offer in Compromise program, a tax debtor without the financial resources to pay the liability will have no other means for resolving the liability.

Since we believe that the federal and state Offer in Compromise programs have the same basic objectives, we recommend

[9] Newly enacted Section 174-a of the New York State Tax Law conforms the life of New York State tax liens against real property to the ten year period applicable to other judgment creditor liens. This law overrules a 1988 New York State Department of Taxation and Finance opinion of counsel that took the position that the life of a tax lien against real property was twenty years even though not refiled at the conclusion of the initial ten year period. The law does not, however, reduce the Department's twenty year period for collections against real and personal property under Article 52 of the CPLR where a tax warrant has been filed.

that the federal Offer in Compromise program be utilized as a model for the New York State program. The federal compromise program has been in place for many years and is generally viewed by the Internal Revenue Service, taxpayers and tax practitioners as working well. Part of the reason this program has worked well is that the Service has developed extensive guidelines over the years to assist the taxpayer in submitting an Offer and to assist the Service in the uniform implementation of the program. We believe that the guidelines for the New York program should take a similar approach, i.e., answer as many questions as possible in advance and leave few issues on which the Department and taxpayers will be without direction in respectively evaluating and making the Offer.

At the federal level, these detailed guidelines are set forth in the Internal Revenue Service Manual rather in the Section 7122 treasury regulations. In this manner, the guidelines can be easily altered and revised on an ongoing basis. If the state could adopt and implement its Offer in Compromise guidelines in a similar form, this would allow for ongoing adjustments more easily than incorporating the guidelines into regulations.

However, regardless of whether the guidelines are incorporated into the regulations or set forth in more easily modifiable form, we believe that the state Offer in Compromise guidelines must set forth more detailed criteria for evaluation of Offers in Compromise than are now present in the proposed regulations. The federal Offer guidelines provide detailed guidance on almost all issues which present themselves to taxpayers and representatives in preparing an acceptable Offer. The state Offer guidelines can easily provide this detail by a selective borrowing from the federal guidelines. In this manner, answers will be provided to many questions that are otherwise left unaddressed in the proposed regulations, e.g., the proper method for valuation of assets; delineation of which of the taxpayer's assets must be considered and which are exempt from consideration in the Offer process; the effect of loss of collection potential through potential discharges of tax in bankruptcy; the proper way to deal with individual offers in the event of a joint liability; the method for valuing the amounts which the state can expect to collect from future income over time; guidelines for collateral agreements; the effect of an accepted Offer on certain tax attributes in returns filed in the future; additional procedures if the Offer is rejected; procedures for implementation of an accepted Offer; and procedures for processing and collecting a defaulted Offer.

By selectively incorporating the federal guidelines, the Department can provide the needed guidance and procedures at very little cost to itself. Furthermore, because many taxpayer representatives have had experience in submitting federal Offers in Compromise, the preparation and submission of a state Offer in Compromise will be expedited by conformity to the federal guidelines. Our suggestions for incorporation of the federal Offer in Compromise guidelines are contained in the following specific comments on the Proposed Regulations.

B. Specific Comments.

1. “Grounds for Compromise”.

The proposed regulations incorporate the subdivision fifteenth statutory requirement that the taxpayer must either be discharged in bankruptcy or, by proof, be insolvent as a ground for making an Offer. The provision further states that a taxpayer is “insolvent” if the taxpayer's liabilities exceed the taxpayer’s assets. In determining liabilities, the amount of the taxpayer's state tax debt will be included. Prop. Regs. Section 5005.1(b)(1) and (2).

Comment:

(a) Discharge in Bankruptcy.

Further guidance should be given on this threshold requirement for making an Offer. If, for example, the taxpayer makes an Offer in 1998 and can show a discharge in bankruptcy in 1996, is this adequate or must the discharge have been received in closer proximity to consideration of the Offer? Presumably, discharges in bankruptcy (whether under Chapter 7 or Chapter 13) were viewed by the legislature as indicative of impaired collection potential. Since a taxpayer who can demonstrate a “discharge” in bankruptcy does not need to provide proof of insolvency, it would seem reasonable for the regulations to require the discharge in bankruptcy be in close proximity to the Offer date (e.g., not more than one year prior to the submission of the Offer). Furthermore, for Chapter 13 bankruptcy discharges, which are technically not granted until completion of a three to five year payment plan, a rule also requiring proof of current insolvency would be reasonable.[10]

(b) Insolvency.

Taxpayers who have not received a discharge in bankruptcy must prove insolvency. However, the question arises as

[10] In many cases, a Chapter 13 debtor will carry substantial assets through the bankruptcy payment plan. Consequently, many Chapter 13 debtors will not be insolvent upon completion of the plan at the time of “discharge”.

to which assets and liabilities are included in that determination, as well as the proper valuation of those assets. Some guidance on this point is contained in the definition of insolvency under Section 270(f) of the New York State Debtor/Creditor Law. This definition of insolvency, however, does not answer the important question as to what assets will and will not be counted in the determination of insolvency. For example, would a tax debtor’s pension plan be counted in this determination even though the assets would not be available to creditors in bankruptcy? Under New York State law, no creditor, including the Department, can recover against the assets of the pension plan either inside or outside bankruptcy. NYCPLR Section 5205(c); see also NYEPTL Section 7-3.1.

In many cases, a taxpayer's pension plan may be his most valuable asset. The policy argument for inclusion of the asset in the determination of insolvency is that the state does not wish to simply ignore this asset and extend Offer in Compromise relief to taxpayers who have built up substantial value in pension plans or other assets beyond the reach of creditors. However, the arguments against inclusion of the plan in the determination of insolvency are that (1) the pension plan would not be counted as an available asset for distribution to New York creditors in federal bankruptcy proceedings and, thus, would not prevent a “discharge” in bankruptcy and (2) the pension plan is not an available asset to the Department of Taxation for collection. NYCPLR Section 5205(c). Accordingly, if the pension asset is valued in determining the threshold issue of “insolvency”, such could result in inconsistent treatment to taxpayers depending upon whether the tax debtor proceeds with an Offer in Compromise on the ground of a discharge in bankruptcy or on the ground of insolvency. For example, assume Tax Debtor A has no significant asset other than a pension plan valued at $300,000. He has received a recent “discharge” in bankruptcy (the pension plan was not counted as an available asset for bankruptcy distribution). Accordingly, he has established grounds for proceeding with an Offer in Compromise. In contrast, Tax Debtor B, who also has no significant assets other than a pension plan valued at $300,000, but who has not gone through a bankruptcy, will be denied consideration of his Offer in Compromise because, after counting the pension plan as an asset, he cannot demonstrate that he is insolvent.

In our view, the threshold determination of which assets should be counted in determining insolvency should be based on similar criteria to the determination of whether the tax debtor would receive a “discharge” in bankruptcy. In other words, if an asset would not be counted as an available asset to creditors, and thus not preclude a discharge in bankruptcy, the asset should not be counted in determining “insolvency” under subdivision fifteenth.

(c) Valuation For Purposes of Determining Insolvency.

Further guidance should also be provided in the proposed regulations in valuing the assets taken into account in determining whether the tax debtor is “insolvent”. Since subdivision fifteenth treats discharges in bankruptcy and insolvency as equally acceptable grounds for proceeding with an Offer in Compromise, there is an argument that the method used to value assets in determining insolvency should conform as closely as possible to the valuation methods utilized in the bankruptcy courts and under New York State Debtor/Creditor Law, i.e., a full fair market valuation of the debtor's assets.[11]

However, we see the Offers in Compromise program as being useful to taxpayers and tax administrators alike and believe its expansion is a desirable goal which would be furthered by a broader definition of insolvency. A broader definition of insolvency does not mandate that the Department enter into agreements with each taxpayer who comes within it; in each case the Department is able to weigh the offer made by the taxpayer and to reject it if it fails to meet the criteria discussed below. Moreover, since the statute is not specific regarding the requirements for establishing insolvency, we believe a somewhat broader definition could be used if desired. For example, instead of using a full fair market valuation of the tax debtor's assets in determining insolvency, the regulations could establish a value which more closely reflects the collection potential from the asset, e.g., “quick sale” value.[12] In this manner, the Offer in Compromise process could be made available to a larger number of tax debtors by liberalizing the standard necessary to demonstrate insolvency. Since we believe it is in the interests of the Department and the taxpayers to open up the Offer in Compromise process to as many tax debtors as possible, we urge the Department to consider use of this method for valuing assets in determining whether the tax debtor has demonstrated the threshold ground of insolvency.

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[11] As discussed in the next section, it will not always be the case that fair market value is the appropriate method for valuing an asset in determining the appropriate “minimum offer”.

[12] A fuller discussion of this approach for valuation of assets appears later in this report under the section entitled “Evaluation of Assets”.

2. Minimum Offer.

The proposed regulations provide that the amount acceptable in the compromise cannot be less than the amount the department could collect through legal proceedings. This concept is more fully developed in a subsequent provision which states that the amount offered “must equal or exceed the amount the department would be able to collect over a period of time through legal proceedings.” In determining collection potential, all legal collection proceedings available to the Department must be considered, including the collection rights of the Department against the debtor's personal and real property under Article 52 of the Civil Practice Law and Rules. By way of example, the proposed regulations state that the examiner should look at the results of a seizure and sale of the taxpayer's real and personal property, including but not limited to the seizure of money from the debtor's bank account, seizure of motor vehicles, debts owed to the taxpayer by third parties and income executions of up to 10% of the taxpayer's gross wages. Prop. Regs. Section 5005(b)(1) and (b)(3).

Comment:

We believe that the statutory subdivision fifteenth requirement that the state recover in an Offer in Compromise “the amount, if any, recoverable through legal proceedings” can be fairly interpreted to be the same as the objective of the federal Offer in Compromise program in cases where the compromise is based on “doubt as to collectibility”, i.e., the Offer must “reasonably reflect collection potential.” IRM 57(10)(10).1. Under federal guidelines, an Offer will “reasonably reflect collection potential” if it takes into account:

(a) the amount collectible from the taxpayer's assets;

(b) the amount collectible from the taxpayer's present and future income;

(c) the amount collectible from third parties, e.g., trust fund recovery penalty and transferee; and

(d) the amount the taxpayer should reasonably be expected to raise from assets in which he or she has an interest but the interest is beyond reach of the government. For example, property located outside the United States or property owned by tenancy by the entirety. Id.

Given the similar objectives for recovery under the federal and state Offer programs, we recommend that the proposed regulations incorporate IRM 57(10)(10),[13] of the federal Offer guidelines in determining an adequate minimum Offer.

(a) Evaluation of Assets.

Essential in determining the minimum acceptable Offer amount is guidance to the taxpayer and to the Department on evaluation of specific assets. The proposed regulations should give guidance regarding what assets will and will not be included in the "minimum offer" determination as well as the method for evaluating these assets. However, this asset listing and method for valuation may differ from that used in determining the threshold issue of "insolvency" since the assets to be included in "the amount collectible from the taxpayer's assets" should be

[13] Some modifications would be required by removing 57(10)(10).3, 57(10)(11).2 and 57(10)(11).3 which are not applicable to state procedures.

based on the Department's realistic evaluation of the reasonable collection potential on the asset. For example, while the regulations may require that an asset be included at full fair market value in determining whether the taxpayer is insolvent, such a valuation would not necessarily be appropriate in determining asset value in the calculation of a minimum acceptable Offer since fair market valuation may not reflect reasonable collection potential to the Department on the asset.

A significant portion of the Internal Revenue Manual on Offers in Compromise is devoted to the issue of asset valuation for a minimum Offer. The section entitled "Evaluation of Special Assets" (IRM 57(10)(13)) gives detailed instructions regarding the inclusion and valuation of cash, securities, life insurance, pension and profit sharing plans, furniture, fixtures and personal effects, machinery and equipment, trucks, automobiles and delivery equipment, receivables, real estate and jointly owned property. In each case, guidelines are set forth which attempt to measure as accurately as possible the true collection potential of the asset. For example, "quick sale value" (i.e., 75% of fair market value) is viewed under the IRS guidelines as a more realistic method for valuing real property than fair market value since this is the more likely amount to be realized by the Internal Revenue Service upon a forced sale or foreclosure on the asset. IRM 57(10)(13).91.

Furthermore, in the case of a tax debtor who jointly owns real property with a person who is not liable for the tax, the guidelines recognize that it is neither reasonable nor appropriate in all instances to count the value of the tax debtor's interest in the property at a full 50% of the net equity in the property. The IRS Manual gives examples of where a lesser percentage (e.g., 20%) would be the more appropriate evaluation of the tax debtor's interest in the property. This approach reflects the practical difficulty to a creditor of recovering more than 20% of the net value of the property in a foreclosure sale on a co-tenant's interest in real property (as opposed to selling the underlying property), especially where the property is held in joint tenancy or tenancy by entirety. IRM 57(10)(13).92.

The IRS Manual also addresses the difficult issue of asset inclusion and valuation of pension and profit sharing plans. IRM 57(10)(13).4. Under this section, the Internal Revenue Service counts as an available asset only IRAs and voluntary "401 (k)" contributions since the Internal Revenue Service can and does levy on these types of accounts. However, the Internal Revenue Service has more extensive powers of collection against such plans than New York State.[14] Under ERISA and NYCPLR Section 5205(c), a tax debtor's pension and profit sharing plans, including IRAs and voluntary 401 (k) contributions, would be exempt from collection by the Department. Since the Department would not be able to levy upon the pension plan or payments from the plan to satisfy the tax debt, we do not believe that a New York tax debtor's pension plan should be counted as an available asset for purposes of determining minimum offer amount. The protection of pension plans from creditors reflects a strong and overriding policy decision at the state and federal levels which should not be undermined in determining the amount acceptable in a New York State Offer in Compromise.

[14] These powers derive from Treas. Regs. 1.401 (a)-13(b)(2).

(b) Evaluation of Income.

Another critical point on which the proposed regulations need to give more detailed guidance to taxpayers and to the Department is on the evaluation of present and future income. The proposed regulations direct that, in determining an adequate Offer in Compromise, the Tax Compliance Division must take into account the collection procedures that would be available to the Department under Article 52 of the CPLR, including income executions of up to 10% of the taxpayer's gross wages. Since a New York State tax liability secured by a filed tax warrant will have a collection life of twenty years under New York State law, there are numerous questions that arise in connection with the state's evaluation of income for Offer in Compromise purposes, including (a) the underlying time period over which collections will be assumed to be made and (b) the method for valuation (i.e., whether the assumed future collections should be discounted to present value).

(i) Assumed Period of Collection.

In determining the period over which the income execution should be assumed collectible for state Offer in Compromise purposes, we recommend adoption of the Internal Revenue Service method for evaluation of future income for federal Offers in Compromise. Even though the Internal Revenue Service has ten years from the date of assessment in which to collect the tax (IRC Section 6501), the Service recognizes that in cases where a tax liability cannot be recovered in full and the taxpayer must make installment payments of the liability over time “that any agreement that requires more than five years to complete has a high probability of not being completed.” IRM 57(10)(13).(10)(1)(c). Accordingly, an Offer by the taxpayer that represents the present value of a five year payment plan (or for a lesser period if fewer than five years remain on the collection statute) reflects the reasonable collection potential from the taxpayer's present and future earned and unearned income. IRM 57(10)(13).(10)(2). Since the recovery rate on liabilities that have been outstanding for more than five years is low in comparison to the cost in administering long delinquent accounts, Internal Revenue Service acceptance of an amount equal to the discounted present value of a five year payment plan meets the goal underlying the Offer in Compromise program of “achiev[ing] collection of what is potentially collectible at the earliest possible time and at the least cost to the government.” IRM 57(10)1.1. This method for valuation of future collections is also in line with the Service's objective that the Offer in Compromise program be “a legitimate alternative to declaring a case as currently not collectible or to a protracted installment agreement.” Id.

We believe that the same considerations are applicable in evaluating the future income collection potential for state Offer in Compromise purposes. Projecting a taxpayer’s wage earning potential (or, for that matter, whether the taxpayer will still be within the state or still earning income) for more than five years into the future is highly problematic. Furthermore, it is likely that the state has also experienced low recovery rates on accounts more than five years old. Since the objective of the state Offer in Compromise program can be fairly interpreted as the same as the federal program, (i.e., to retire accounts that would otherwise not be fully collectible for an amount representing the reasonable collection potential of that account), we believe that the approach of the Internal Revenue Service in valuing future collections from income should be adopted. This would establish a value for future wage garnishments equal to the discounted present value of a five year wage garnishment based on the taxpayer's current wage.[15]

A further reason for the state to consider adopting this valuation approach is the significant increase in the minimum Offer required if a longer term is used. Assume, for example, a tax debtor who currently earns wages of $48,000. The state could now garnish up to $400 a month under a 10% income execution to collect on tax debts. If the federal guideline for evaluation of future income collections is used, the future collections would be valued at $19,428, i.e., the discounted present value of a five year payment plan at $400 3 month.[16] If, however, the collection evaluation assumes a continuation of the existing wage levy of $400 per month for the remainder of the twenty year collection statute, the valuation could be as high as $44,458, (assuming a full twenty year term). If the income execution were not discounted to present value, the collections from future income would be valued at $96,000, i.e., $400 a month for twenty years.

Of all the factors that are taken into account in determining the minimum Offer amount, the valuation of future income collections is potentially the most critical since an overvaluation of this asset can easily make the minimum Offer amount out of reach of most taxpayers. This is a result that is not in the interest of either the state or the taxpayer. We believe that the valuation approach now employed by the Internal

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[15] We do not believe that the subdivision fifteenth requirement that the minimum compromise amount be "the amount, if any, recoverable through legal proceedings", requires an assumption that the value of an income execution be deemed equal to a 10% wage garnishment of the taxpayer's current income over the entire remaining life of the twenty year collection statute.

[16] The discount rate (currently 9%) for computing present value under the Internal Revenue Service Manual guidelines is based on the current rate charged on underpayments. IRM 5171.

Revenue Service in its Offer in Compromise program reflects the reasonable collection potential from future collections and should be adopted by the state. Furthermore, as demonstrated by the example given above, the longer the assumed collection period, the more likely it will be that the minimum Offer amount will be out of reach for most taxpayers.[17] The higher the hurdle is made for the tax debtor to resolve the liability through an Offer in Compromise, the more appealing will be a Chapter 7 or Chapter 13 bankruptcy -- where any payment will often be a fraction of the amount required for an Offer. (See discussion infra.)

(ii) Effect of Potential Bankruptcy Discharge.

In evaluating the state's collection rights against the taxpayer's future earnings, the Department also needs to address in the proposed regulations the effect of dischargeability of the tax debt in a bankruptcy proceeding. Where, for example, the liability involves income taxes that can be discharged by the debtor in bankruptcy, to what extent should this be a factor in evaluating the reasonable collection potential of the Department as to that liability?

We recommend that the proposed regulations Incorporate the Internal Revenue Service guidelines on this subject. IRM 57(10)(13).(12). These provisions grant the needed flexibility to the Service to accept an Offer amount less than would normally be required under a strict “asset/income” analysis if the Service concludes that a lesser amount would be recovered if the taxpayer were to seek bankruptcy relief instead. For example, assume the case of a taxpayer who under a strict

[17] In addition to the value of future income collections, the tax debtor must also add to the “minimum offer” the net value of all assets.

"asset/income" calculation would need to make a minimum Offer of $40,000. If, however, the taxpayer could demonstrate that the IRS would receive only $10,000 in a bankruptcy payout, the Service would be free to accept the taxpayer's Offer of $25,000. By incorporating this guideline into the proposed regulations, the Department will build in needed flexibility to resolve the tax debt on terms that maximize potential collections.

3. Compromise of Trust Fund Taxes.

The proposed regulations provide that in the case of "trust tax liabilities" (e.g., withholding tax, sales and compensating use tax), the amount of the Offer should reflect at least the amount of the outstanding tax due. Prop. Regs. Section 5005(b)(1).

Comment:

This provision appears to be based on a policy decision by the Department to require a potentially higher minimum Offer amount for the compromise of trust fund taxes[18] than would be strictly required by statute, i.e., "the amount, if any, recoverable through legal proceedings." We understand the Department's concern that the Offer in Compromise program not undermine taxpayer compliance in paying use taxes and collecting and paying over withholding and sales taxes.

Similar considerations are taken into account at the federal level in the compromise of employment taxes. The Internal

[18] As noted earlier, we do not believe that "use" taxes fall within the category of "trust fund" taxes since the tax debtor is directly liable for the tax. In contrast, the obligation to collect and pay over sales taxes and withholding taxes imposes a fiduciary duty. Tax Law Section 1133(a); 20 NYCRR Section 523.3.

Revenue Service guidelines provide that in considering the compromise of employment taxes that “[w]hen the same business is operating, we would normally not accept an offer for an amount less than the tax, exclusive of penalties and interest.” IRM 57(10)(14).1. The guidelines go on to provide, however, that

> if, considering all factors, including the taxpayer's demonstrated ability to stay current, it is obvious that accepting an offer would be in the total best interest of all parties, an offer can be accepted for an amount less than the taxes as long as the amount offered reasonably reflects collection potential. Id.

In cases where employment tax liabilities are sought to be compromised at the federal level by taxpayers that are no longer in the same business or by individuals liable under the “trust fund recovery penalty” provisions of Section 6672 of the Internal Revenue Code,[19] the Internal Revenue Service does not impose a higher minimum Offer standard than for other types of tax delinquencies. An Offer will be accepted if it reasonably reflects collection potential. IRM 57(10)(14) et seq.

We are concerned that the imposition of a minimum Offer amount equal to the underlying tax liability in the case of trust fund taxes may deny needed flexibility to the Department in evaluating the Offer and may deny access to the taxpayers most in need of the Offer program. Many taxpayers with the largest liabilities and, thus, the most need for the Offer in Compromise program, have withholding and/or sales and use tax assessments against them. Often, the underlying assessment is based on a “responsible officer” assessment for unpaid taxes of a business

[19] IRC Section 6672 is the federal counterpart of the responsible officer liability for employment taxes and sales taxes under Sections 685(g) and 1133(a) of the New York State Tax Law.

that has failed.[20] In some cases, the individuals might have been able to assert meritorious defenses against the “responsible officer” liability had they availed themselves of the appeals process to challenge the assessment. Given the short timeframe for appeal (90 days) and the lack of understanding that many individuals have in connection with this liability, many do not do so and the tax becomes final without any further opportunity for review except through the refund process, which requires payment of the tax.[21] While the same can be said of many “trust fund penalty tax” assessments against “responsible persons” for unpaid federal employment taxes, a review of “responsible person” liability under Section 6672 of the Internal Revenue Code can be undertaken at the federal level as part of the Offer in Compromise evaluation since “doubt as to liability” is one of the grounds for compromise of the liability.

Given the broad range of circumstances that can underlie a trust fund tax assessment against an individual, it is our view that the state Offer in Compromise program needs to preserve as much flexibility as possible in dealing with the compromise of trust fund taxes. Although subdivision fifteenth does not allow the Commissioner to compromise a tax liability on the ground of “doubt as to liability”, we believe that if a taxpayer has made an Offer to the state to compromise a trust fund tax liability by payment of an amount that would be sufficient under “asset/income” guidelines (and thus reflects the reasonable

[20] Tax Law Sections 685(g) and 1133(a). Again, there is some question as to the appropriateness of “responsible officer” assessments in the case of use taxes assessed against a business since there has been no personal failure to collect and pay over the tax.

[21] While the Department does, at times, cancel unwarranted assessments through the use of the “courtesy conference”, this procedure is available only at the discretion of the Department and is generally requested only by taxpayers who have tax advisers with substantial experience in dealing with New York State tax matters.

collection potential of the liability), the Commissioner should be permitted to accept that Offer and close out the account without regard to whether the amount reflects full payment of the tax portion of the liability. While delinquencies in payment of trust fund taxes are reprehensible and in no way to be encouraged, the imposition of an inflexible minimum Offer amount in the compromise of trust fund taxes has the potential for requiring a higher Offer amount than can be paid by the tax debtor or reasonably recovered by the state. Since denial of such Offers does not advance the goal of the program and would unnecessarily deny collection recoveries to the state, we recommend incorporating into the proposed regulations the federal guidelines of IRM 57(10)(14) in connection with the compromise of trust fund taxes.[22]

4. Statement of Financial Condition.

The proposed regulations provide that as a condition to accepting an Offer in Compromise, a taxpayer must submit a statement of financial condition and other information prescribed by the Department. The regulations further provide that a taxpayer may be required to submit certified financial statements. Prop. Regs. Section 5005(c)(2).

Comment:

The regulation should make it clear to the field that requiring "certified financial statements" will only be appropriate where an established and substantial going business is involved. Individual wage earners and sole proprietorships would find it close to impossible to obtain such statements. If

[22] The discretionary authority of the Department in granting Offers in Compromise can serve to weed out abusive or close cases.

they could be obtained at all, they would be prohibitively expensive at a time when expense could hardly be afforded. Also, such financial statements based on standard auditing procedures (such as sampling) are far from “guaranteed” by a certified public accountant and would add very little of significance for these purposes to financial statements submitted by the parties under penalties of perjury. Finally, and perhaps most importantly, a certified public accountant can only issue such financial statements based on “generally accepted accounting principles” which simply would not be applicable to the vast majority of the taxpayers that are likely to be involved in the Offer in Compromise system.

5. Post Offer Compliance Period.

The proposed regulations provide that if an Offer in Compromise is accepted, the taxpayer agrees “to remain current in all taxpayer filing and payment requirements and to immediately pay in full any new tax assessments which may be issued for a period of five years from the date of the acceptance of the offer;”. Prop. Regs. Section 5005(c)(3)(v).

Comment:

The imposition of a condition that the tax debtor maintains compliance for a five year period after acceptance of the Offer is similar to a requirement imposed upon acceptance of a federal Offer in Compromise. However, the wording of the proposed regulation differs slightly from the federal provision and raises an issue of substantial importance, i.e., whether the condition imposed by the proposed regulations would require a taxpayer to pay in full any new tax assessment made within the subsequent five year period even the assessment relates to a tax filing made prior to acceptance of the Offer in Compromise. For example, assume that a taxpayer's Offer is accepted in 1997 to compromise taxes owed for 1990, 1991 and 1992. In 1998, a deficiency assessment for tax year 1995 is made against the taxpayer and he is unable to make full payment. Would the failure to full pay the 1995 assessment result in a default of the agreement, thus nullifying the Offer in Compromise? We believe that it should not.

The federal five year compliance condition, as stated in Form 656, reads as follows:

> I/We will comply with all provisions of the Internal Revenue Code relating to filing my/our returns and paying my/our required taxes for 5 years from the date IRS accepts the offer.

This condition requires the taxpayer to remain current for the future in the filing and payment of all tax returns during the five years following the Internal Revenue Service's acceptance of the Offer. Any additional federal assessment made against the taxpayer (which is not full paid) during the five year compliance period which relates to a tax filing that pre-dates the Offer, would not, in our view, result in a breach of the agreement so as to allow the Internal Revenue Service to nullify the Offer. See IRM 57(10)(20) and IRM 57(10)(21).5.

One objective of the Offer in Compromise program is to provide tax debtors with a fresh start toward future compliance with the tax laws. Once an Offer in Compromise has been accepted, there should be no opportunity for either party to rescind or nullify the Offer in the absence of (a) fraud, (b) mutual mistake as to a material fact, (c) noncompliance with payment of the Offer amount, or (d) failure to comply with the tax laws prospectively for at least five years. If there is an additional assessment against the taxpayer during the post-Offer five year compliance period which does not relate to a filing made by the taxpayer after acceptance of the Offer, we do not believe that a failure of the taxpayer to be able to full pay this assessment should be grounds for rescission of the Offer.[23] Accordingly, we recommend that the five year post-Offer compliance condition in the proposed regulations be reworded as follows:

> "Agrees to comply with all provisions of the New York State tax law relating to filing of returns and paying required taxes for all returns required to be filed in the five year period beginning with the date of the acceptance of the offer;"

6. One Offer.

The proposed regulations provide that the taxpayer may make only one Offer in Compromise regarding a particular tax liability for a particular taxable period. The Offer may be amended prior to final submission to the Tax Compliance Division. Prop. Regs. Section 5005(c)(4).

Comment:

This limitation tracks a similar limitation imposed in the regulations under subdivision eighteenth-a. See 20NYCRR Section 5000.3(f). Subdivision eighteenth-a, however, applies only to Offers in Compromise submitted to the Department in the limited timeframe prior to when the tax or administrative action becomes finally and irrevocably fixed and no longer subject to administrative review.

[23] Such an assessment would likely have been unforeseen at the time of the Offer. Otherwise, the taxpayer would have included the period within the Offer.

In the case of Offers submitted under subdivision fifteenth, where the tax has already become final and tax warrants or judgments are likely to have been filed, we do not believe that such a restriction should be imposed. Unlike the limited timeframe applicable for submission of Offers in Compromise under subdivision eighteenth-a, a tax debtor submitting an Offer under subdivision fifteenth faces a twenty year period of collection in connection with that tax liability. The tax debtor's financial circumstances and collection potential may change significantly over that twenty year collection period and an Offer rejected in year five of the collection period may well be acceptable in year twelve of the collection period if there is a change in circumstances or the Offer is increased. The federal Offer in Compromise program has no limitation on the number of Offers that can be submitted and, in the case of a rejected Offer, taxpayers often are encouraged to pursue another Offer in the future.

We believe that it is in the best interest of the state and the taxpayer to allow for the submission and processing of Offers in Compromise without restriction during the collection period of the liability. The making of an Offer is a “privilege” not a “right” to the taxpayer and the Department will have the discretion to reject frivolous offers or those made simply for the purpose of delaying collection of tax liabilities. Proposed Regulations Section 5005.1(e)(2)”(i)”.

7. Offer Processing.

The proposed regulations provide that an Offer in Compromise will be reviewed by the Tax Compliance Division, which, in turn, will recommend acceptance or rejection of the Offer to the Commissioner. Upon a recommendation of acceptance by the Tax Compliance Division, the Commissioner may either accept or reject the Offer. If the amount forgiven is more than $25,000, any Offer accepted by the Commissioner must be referred to a justice of the Supreme Court for approval prior to any notification to the taxpayer of acceptance. Prop. Regs. Section 5005(d)(1) and (d)(2).

Comment:

The proposed regulations do not address whether the initial evaluation by the Tax Compliance Division of the Offer in Compromise is to be made by a field representative or by a centralized Offer in Compromise specialist[24] Whatever the procedure for evaluation, we urge the Department to put in place an appeal process for review of any Offer in Compromise denied at the Tax Compliance level. Such would track the process in place at the federal level where denial of an Offer can be appealed for independent evaluation to Appeals. IRM 57(10)1.(12).

An appeal procedure not only insures a more uniform application of the standards imposed for granting or denying Offers in Compromise, but also fosters a sense of fairness in the administration of the program. Putting in place an independent appeals process, whether in the Commissioner's Office, Chief Counsel's Office or by conciliation conference, will ensure greater uniformity and fairness in the implementation of the Offer program.

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[24] While there are advantages in setting up a centralized group specializing in the review and evaluation of offers, we also encourage the use of field representatives for direct contacts with the tax debtor if questions arise regarding valuation of assets or other issues.

8. Defaulted Offers.

The proposed regulations provide that where a taxpayer does not comply with the conditions of the Offer in Compromise, or where there is evidence of a substantial misrepresentation of a material fact subsequent to the acceptance of the Offer, the Department may deem the Offer in default and reimpose the full tax liability and proceed to collect the balance of the original liability without notice to the taxpayer. Prop. Regs. Section 5005(f).

Comment:

We recommend that the procedures dealing with default of an Offer in Compromise be conformed to those applicable to federal Offers in Compromise. Under the federal guidelines, an Offer in Compromise is binding on the parties in the absence of mutual mistake as to a material fact or false representations made by one party about a material fact. While the Internal Revenue Service has the power to nullify, rescind or deem the Offer in default and, consequently, to reimpose the liability and proceed to collection without notice, the approach of the Internal Revenue Service has been to attempt to secure compliance on potential defaulted cases rather than to proceed immediately to termination of the Offer. These procedures are set forth in IRM 57(10)(20) and IRM 57(10)(21).

Given the severe repercussions to the taxpayer upon default of an Offer in Compromise, we believe that the more restrained approach taken in the federal guidelines should be adopted in the state Offer in Compromise regulations.

9. Collateral Agreement.

The proposed regulations provide that, in an appropriate case, the Department may require as a condition of approval of the Offer a "signed agreement wherein the taxpayer agrees to pay over a fixed percentage of the taxpayer's future earnings or other income for a specific period of time." Prop. Regs. Section 5005(c)(2)(i).

Comment:

While the Internal Revenue Service has for many years sought collateral agreements to collect additional amounts to be paid over and above the amount accepted in an Offer in Compromise, the use of collateral agreements has been discouraged in recent years with efforts focused instead on securing lump sum payments of Offers in Compromise.

> "Collateral agreements should not be routinely secured but secured only when a significant recovery can reasonably be expected. Securing of a collateral agreement should be the exception and not the rule." IRM 57(10)(15).1(3).

The advantage to this approach is quite clear. A major benefit to the government in securing an Offer in Compromise is to achieve collection now of an account unlikely to be collectible in full. To the extent the account must continue to be overseen or managed for several years, either by reason of installment payment of the Offer or the need to oversee compliance with a collateral agreement, the government continues to incur costs in connection with that account. Closure of the account upon receipt of payment of the Offer frees up personnel to pursue accounts with higher collection potential.

From the taxpayer's standpoint, the imposition of a collateral agreement adds considerable uncertainty regarding the amount to be paid to resolve the liability. The collateral agreement also undermines the objective of the Offer program to grant a “fresh start” to the taxpayer in rebuilding assets or increasing earnings for the life of the collateral agreement (usually five years). Accordingly, we urge that the regulations incorporate the federal guidelines under IRM 57(10)(15), entitled “Use of Collateral Agreements”.

CONCLUSION

Since the goals and underlying policies of the state Offer in Compromise program are consistent with those of its federal counterpart, we urge incorporation into the proposed regulations of selected portions of the federal Offer in Compromise guidelines to provide needed guidance to taxpayers and to the Department in administering the state Offer in Compromise program. An Offer program that is fairly administered and which gains the confidence of taxpayers and their representatives is in the best interest of the state and its taxpayers since, on the one hand, tax debtors will be given a fresh start toward future compliance with the tax laws and, on the other hand, the state will achieve, at a minimal cost and at the earliest possible time, the amount reasonably collectible on the account.

As a final note, we believe that the New York State Offer in Compromise program would benefit significantly from statutory changes to the underlying enabling legislation. The present subdivision fifteenth requirement that a tax debtor demonstrate a discharge in bankruptcy or insolvency to be eligible for an Offer in Compromise is, in our view, a needlessly restrictive condition which does not advance the overall goals of the program. At the federal level (and also in subdivision eighteenth), no such showing need be made in order for a tax debtor's Offer to be considered. Since the tax debtor must make a minimum Offer which equals or exceeds the net equity in his assets, the restriction is counterproductive since the tax debtor must pay down his assets to the point of insolvency if the Offer is accepted. To require that the tax debtor demonstrate balance sheet insolvency prior to making the Offer eliminates many potential tax debtors from the Offer program.[25] There is no reason apparent to us why solvent, but hopelessly indebted taxpayers, should not be allowed to participate in the New York State Offer in Compromise program and to pay down the net equity in their assets to satisfy their tax debts just as they would be able to do under the federal Offer in Compromise program.

[25] The problem arises if there is any disparity in assets counted or valuation method used in determining “insolvency” and “minimum offer” amount. For example, assume tax debtor with assets having a fair market valuation of 100, but a “quick sale” value of only 60. Assume also secured debt of 50 and tax debt of 25. In the federal Offer in Compromise program, a minimum offer of 10 would reflect the net equity in assets owned by the taxpayer and thus be potentially acceptable to compromise the 25 tax debt. Under the New York program, if assets are, valued at fair market value to determine “insolvency”, an offer would not even be entertained since the tax debtor would show a balance sheet solvency of 25.