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In this installment of Moving Forward?, Nellen offers suggestions for states to reduce borrowing needs, reduce taxpayer frustration, lessen upcoming tax compliance issues, modernize tax systems for the 21st century, and ensure the opportunity for lessons learned occurs, considering the significant and uncommon challenges presented by the COVID-19 pandemic.

No doubt, the COVID-19 pandemic invaded our lives, creating substantial challenges to our well-being in terms of health, finances, and societal interactions. The pandemic also delivered ongoing tax system challenges, including how to get through a filing season severely interrupted by it. In addition, tax and nontax law changes to provide financial assistance and filing relief created new difficulties even when labeled as "relief." Taxpayers and their advisers were conscripted into quickly figuring out how new provisions operate while at the same time dealing with their own challenges of sheltering in place and helping colleagues and clients. Lawmakers and tax agencies had to gauge what assistance was most suitable for immediate relief while also considering the likely adverse impact to state and local budgets and tax agency operations.

The word "endurance" is used in the title of this article as it reminds us that while tax and fiscal systems were shocked in many ways by this pandemic, we must ensure that these systems have "the ability or strength to continue or last, especially despite fatigue, stress, or other adverse conditions."[1] The pandemic causes us to reevaluate many activities of everyday living, including access to necessities of life, how technology can improve many everyday transactions, and how quickly we can react to drastic change. Pandemic-related tax changes highlight opportunities that we should pursue to explore how to have more equitable, simpler, and technologically advanced tax systems. Also, we should be sure we, as a society, consider what is needed to be best prepared for the uncertain and unexpected because sadly, disaster — from tornado, hurricane, fire, or widespread health dangers — can happen at any time. This article offers suggestions in the following nine areas to help state tax policy endure and be stronger going forward:

- protection needed for revenues;

[1]*Endurance*, *Dictionary.com*.

- certainty needed for tax law changes;
- creativity needed for effective assistance;
- openness needed for new nexus and sourcing issues because of sheltering in place and remote work;
- compassion needed for reasonable tax mistakes;
- transparency needed for fiscal challenges;
- funds and plans needed for implementation of modern technology;
- strategy needed to address tax and related inequities exposed during the pandemic; and
- identify lessons learned and act on them.

I. Funding Sources Exist — Get the Money

By early March, about two months into the filing season for 2019 returns, it was becoming clearer to everyone that life was about to change, bringing much bigger concerns than filing season tax compliance. On March 13 President Donald Trump declared that the pandemic was "of sufficient severity and magnitude to warrant an emergency declaration" throughout the country.[2] On March 19 California became the first state to issue a shelter-in-place order for everyone other than those in critical or essential infrastructure sectors defined by federal law with modifications.[3]

California was one of the first states to address concerns about how tax returns and 2019 and 2020 income tax payments would be made with government offices closed, free tax preparation sites closed, and tax advisers scrambling to provide services within the realm of social distancing and new uses of technology. And with many people out of work or facing reduced business revenue and new costs such as child care because of school closures, tax payments would be problematic for those who owed for 2019 and those who make quarterly estimated tax payments with the first one normally due April 15.

On March 13, the California Franchise Tax Board "announced special tax relief for California taxpayers affected by the COVID-19 pandemic." Returns and payments due March 15 through June 15 were extended to June 15, including the first quarter payment of 2020 income taxes. The FTB also noted that these dates could be extended if the IRS granted a longer relief period.[4] Most states issued similar extensions either by legislation or by authority of the tax agency. Like the IRS declarations extending filing and payment dates, the emphasis was on *all* individuals and most businesses being granted the payment and filing extensions. For example, an executive order by Michigan Gov. Gretchen Whitmer (D) states[5]:

> Strict compliance with rules and procedures under sections 315, 681, and 685 of the Income Tax Act of 1967 ("Income Tax Act"), 1967 PA 281, as amended, MCL 206.315, 206.681, and

[2]Federal Emergency Management Agency, "COVID-19 Emergency Declaration," HQ-20-017-FactSheet (Mar. 13, 2020).
[3]Executive Department, State of California, Executive Order N-33-20 (Mar. 19, 2020). This followed a proclamation of a state of emergency in the state on Mar. 4, 2020.
[4]*See* State of California Franchise Tax Board, "More Time to File, Pay For California Taxpayers Affected by the COVID-19 Pandemic" (Mar. 13, 2020). This relief was later expanded to more returns and to July 15, 2020.
[5]The Office of Gov. Gretchen Whitmer, Executive Order 2020-26 (COVID-19) (Mar. 27, 2020).

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206.685, is temporarily suspended so as to extend the deadline for all taxpayers required to file an annual state income tax return in April 2020, as follows:

1. An annual state income tax return otherwise due on April 15, 2020 will instead be due on July 15, 2020.

2. An annual state income tax return otherwise due on April 30, 2020 will instead be due on July 31, 2020.

These tax relief measures are significant for states because they push 2019 tax deficiencies and first, and perhaps second, quarter 2020 estimated tax payments into the next fiscal year.[6] They are also broad in that not all taxpayers need additional time to make their tax payments. That is, high-income taxpayers typically have resources available not only to address changes caused by the pandemic but also to timely pay taxes. Individuals of any income level who continue to work with little to no increased costs because of the pandemic are also likely able to pay on time. The broad extension statements covering all taxpayers likely caused cash-wealthy taxpayers and those with unchanged financial status — both individuals and businesses — to go with the July 15 date.

Federal pandemic relief also included $292 billion of recovery rebates (also known as economic impact payments) for most individuals,[7] even if the recipient did not need the funds. Also, federal tax changes allow for net operating losses for 2018, 2019, and 2020 to be carried back five years, a measure that — if also followed at the state level — exacerbates state budget issues.

Despite filing and payment extensions and new tax breaks to help taxpayers with new financial problems, there are funding sources that states should consider. Following are suggestions for getting funds to help the state and to find alternative sources for some state spending or tax reductions.

A. Encourage Taxpayers With the Means to Pay to Do So at the Usual Time

The pandemic has not created economic hardship for everyone. Wealthy individuals and cash-rich businesses and those perhaps even experiencing greater business activity during the pandemic[8] can still pay taxes on time. And it is these taxpayers that generally provide a considerable amount of tax revenues. Federal and state messages that said everyone had until July 15 (in most states)

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[6]Not all states extended April 15 tax payments for 2019 and 2020. For example, in Arizona General Tax Notice GTN 20-1, the Department of Revenue extended the filing and payment for 2019 returns from April 15 to July 15 but kept the usual first and second quarter estimated tax payment dates for 2020 taxes. Arizona Department of Revenue, GTN 20-1 (Apr. 1, 2020). For a complete list of state tax actions regarding due dates, see AICPA, State Tax Filing Guidance for Coronavirus Pandemic.

[7]The Joint Committee on Taxation, JCX-11R-20 (Apr. 23, 2020).

[8]For example, Microsoft reported that for the quarter that ended Mar. 31, 2020, revenue increased 15 percent and net income increased 22 percent. The company also reported that for this quarter, "COVID-19 had minimal impact on the total company revenue." "Microsoft Cloud Strength Drives Third Quarter Results" (Apr. 29. 2020).

but to file earlier if getting a refund should have instead been worded to encourage those with the means to pay before June 30 to do so to reduce borrowing needs and costs for states.

Statements about additional time to make tax payments for any disaster relief should always include language that individuals and businesses who are able to pay timely are encouraged to do so. Given the significant amount of revenue that comes from high-income individuals, that phrasing sends a better message and reminder that governments also need funds during a disaster.

The first notice issued by the IRS to grant additional time to pay and file had dollar thresholds. Notice 2020-17, 2020-15 IRB 590, postponed payments up to $1 million for individuals. This is not an ideal approach though, because it related to pre-pandemic tax liabilities and required some taxpayers to perform extra work to see how the extension applied (or did not apply) to them.

To help taxpayers understand the message to pay on time if possible, despite a broad grant of authority to pay at a specified later date, governments should inform the public of their costs of borrowing related to these extensions. This might better entice taxpayers with the means to pay to do so earlier.

B. Ask Cash- and Property-Rich Taxpayers to Help Now and to Pay It Forward

To obtain needed funds today, encouraging taxpayers to prepay property and income taxes can help. The downside is that the prepaid taxes will not be available in future years. Thus, states might only permit a portion of future taxes to be paid early. While a discount could be offered, with interest rates low and many people interested in helping, it should not be. These taxpayers should be given assurance that the advance tax payments will be properly recorded; taxpayers should keep good records as well.

Some people with the means to do so continued to pay their home cleaners, hairstylist, and others during the pandemic even though they were not providing services. Why not also ask and encourage people able to do so to pay their state and local governments the sales tax and gasoline excise taxes that they would normally be paying — and more, if possible. To be sure that people know of this opportunity, government agencies should promote it on websites and in press releases.

C. Make it Easy for Taxpayers to Help Others Financially

Despite the severe blow to the economy and the finances of many households, many individuals and businesses can help others. States should be ready to aid in the collection and effective distribution of these donated funds. These funds include the federal economic impact payments that were part of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136), which some recipients would like to transfer to those with greater needs.
An example of this type of transfer was a proposal in Pennsylvania for the Common Wealth Fund managed by the Department of Revenue to enable individuals to contribute their economic

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impact payment to help those with a need greater than that of the recipient.[9] Those funds should be created in a way that makes the contributions qualify as charitable deductions for federal and state purposes. Another example is Silicon Valley Strong, a fund coordinated by Santa Clara County and others to get money, food, and other supplies to individuals and nonprofit organizations in need. This entity's website (www.siliconvalleystrong.org) explains how to both get help and offer help.

D. Be Sure the Relief Available in Federal COVID-19 Legislation and FEMA is Fully Used

Federal COVID-19 legislation such as the CARES Act[10] includes several forms of financial assistance for individuals, businesses, and others. Many eligible recipients might not be aware of the assistance available to them, such as unemployment compensation for self-employed individuals, economic impact payments even for nonfilers, disaster loans, paid leave from their employer, and assistance for some farmers.[11]

Some COVID-19 federal legislative changes were too complex, potentially causing the benefit to go unused by the individual or business targeted by the relief. For example, the Families First Coronavirus Response Act (FFCRA) (P.L. 116-127) required small employers with under 500 employees to pay up to two weeks of sick leave and up to 10 weeks of family leave if conditions were met and documented by the employer and employees. The amounts paid translated into fully refundable payroll tax credits. This law includes numerous requirements to meet and terms to understand. Guidance from the relevant federal agency was also complex. For example, the Department of Labor (DOL) issued over 100 FAQ on the paid leave credits, while the IRS issued over 60 FAQ. The DOL also issued a temporary rule on the leave, which it later updated after losing a challenge brought by the attorney general of New York about key aspects of its rule.[12]

Many small businesses do not have ready access or cannot afford to hire legal counsel to assist them in complying with new and existing laws. State and local officials should work together to propose techniques to avoid that complexity for small businesses in the future.

Governments should also create resources to help constituents. For example, depending on the expertise needed, employees (such as labor law attorneys working for the state employment or labor department) could be designated to help individuals and small businesses during a disaster. One or more state or local government agencies should be required to collect and regularly update names and expertise of a volunteer corps able to assist for a myriad of possible needs

[9]Memorandum of State Senator Anthony H. Williams, "Creating the 'Pennsylvania Commonwealth Fund'" (Mar. 30, 2020).

[10]Federal COVID-19 legislation with tax provisions: Families First Coronavirus Response Act (FFCRA) (P.L. 116-127); and Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136).

[11]*See*, *e.g*., the U.S. Department of Agriculture website on several types of assistance for farmers.

[12]*State of New York v. Department of Labor*, No. 20-CV-3020 (JPO) (S.D. N.Y. Aug. 3, 2020). Just over a month afterwards, the DOL issued an updated temporary rule and FAQ 101 to 103 to address the issue it lost in this case. *See* , "U.S. Department of Labor Revises Regulations to Clarify Paid Leave Requirements under the Families First Coronavirus Response Act" (Sept. 11, 2020); and Families First Coronavirus Response Act: Questions and Answers.

during a disaster or crisis. This is especially important when state and local laws may create special considerations in how they interact with similar federal laws. For example, some cities and states created new required sick leave laws that may have broadened the paid leave requirements of the FFCRA.[13]

State and local governments should also help small and medium-size businesses with any documentation required to obtain and support federal benefits. For example, the FFCRA requires employers subject to the act's paid leave provisions to obtain written documentation from employees to show they were qualified for the sick or family leave that produced the employer's fully refundable payroll tax credits. This documentation can include proof that a child's school was closed, the relevant dates, and government isolation orders. Some employers might not realize they need this proof or do not have all that is required until a future audit by the U.S. Department of Labor or IRS. To help these employers and employees, state and local governments should either require public schools to keep information about their closure on their website for at least four years or consolidate all information on a state-level website.

Some federal funds might be available, such as from the Federal Emergency Management Agency, because of the pandemic being declared a federal disaster on March 13, 2020.[14] And states might be able to obtain additional FEMA assistance depending on need and the length of the pandemic.[15] The federal disaster declaration also made IRC section 139, disaster relief payments, available, which employers might want to use, if possible, to provide tax-free assistance, such as technology resources for children of employees.

Providing lists of these federal and state resources on websites and to elected officials who individuals and businesses often call for assistance should prove helpful for the duration of the pandemic and beyond. Many taxpayers might not realize until months or years later that they were eligible for financial or tax relief measures and will seek information on it, likely from government agencies and elected officials.

E. Consider Tax System Oddities and Outdated Items That Can Generate Revenue

While not easy during difficult times, lawmakers should always be looking for tax loopholes to close, outdated provisions to repeal, and inequities to fix or remove. The weakened budgets following the pandemic can be helped by addressing these areas. Working to identify helpful tax law changes annually is necessary.

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[13] For example, Los Angeles required all employers to provide employees with supplemental paid sick leave for COVID-19 reasons (Ordinance No. 186590). Some of the provisions of this ordinance, such as the maximum pay level, tie to the FFCRA. Providing assistance to small businesses on how to comply with local, state, and federal sick pay laws during the pandemic helps ensure that the rules are followed and any possible federal benefits are fully obtained.

[14] FEMA, *supra* note 2. All states, the District of Columbia, and four territories were approved for major disaster declarations. FEMA, COVID-19 Disaster Declarations.

[15] For details on the federal disaster declaration process and state benefits for the pandemic, see Congressional Research Service, "Stafford Act Declarations for COVID-19 FAQ" (Apr. 22, 2020).

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Examples of problem areas to address include:

- tax breaks based on age rather than need (such as senior exemptions);
- outdated economic stimulus provisions;
- tax incentives that are no longer needed;
- a rate structure that can be more progressive;
- tax breaks that favor high-income taxpayers or those who do not need breaks (such as credits for purchasing expensive electric cars and necessity-of-life sales tax exemptions that benefit high-income consumers more than others[16]);
- conformity to federal tax breaks when state relief is not warranted; and
- negative externalities when significant costs are not compensated sufficiently or at all by those creating the externality.

F. Push for More Federal Tax Relief

In addition to pushing Congress for more state and local government aid, lawmakers should help the individuals and businesses in their state obtain needed federal support and relief. Legislators and state agencies can find out from constituents and industry associations what additional relief would help. For example, businesses could have used additional Paycheck Protection Program funds and flexibility to obtain cancellation of the loans. Many taxpayers sought (and continue to seek) guidance on how some provisions of the federal COVID-19 legislation work so they could effectively and correctly use the provisions.

An example of requesting federal relief is a March 26 letter from the attorneys general of 24 states and the District of Columbia requesting that the U.S. Department of Education "immediately implement emergency measures to protect federal student loan borrowers in the wake of the COVID-19 crisis."[17]

II. Describing Relief Provisions — Focus on Certainty

While a lot of relief measures were undertaken quickly by all levels of government, a good deal of them were drafted in terms difficult to understand. Given the immediate need for relief, these provisions were typically effective within one or two weeks with little time to obtain clarification. Certainty needs to be a goal of all laws,[18] but especially when there is a need to understand and apply the rules quickly.

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[16]Annette Nellen, "Now Is a Good Time to Start Fixing the Sales Tax Base," *Tax Notes State*, Sept. 7, 2020, p. 987.
[17]Letter from Letitia James, Attorney General of New York, to U.S. Department of Education Secretary Elisabeth DeVos, "Re: Emergency Measures to Protect Student Loan Borrowers" (Mar. 26, 2020).
[18]The tax principle of certainty is described by the AICPA as follows: "tax rules should clearly specify how the amount of payment is determined, when payment of the tax should occur, and how payment is made." AICPA, "Guiding Principles of Good Tax Policy: A Framework for Evaluating Tax Proposals," at 3 (2017).

For example, a California executive order issued April 23 on some federal aid under the CARES Act[19] includes the following language:[20]

> It shall be unlawful to collect any money in a manner inconsistent with Paragraph 1 or Paragraph 2, or to retain any money so collected, including (but not limited to) any money so collected prior to the date of this Order. Any money so collected shall be promptly refunded without any further action (including, but not limited to, the filing of any claim of any kind, or the payment of any fee or penalty of any kind) by the individual entitled to that money under Paragraphs 1 and 2.

A press release accompanying the order mentions 90 days forbearance as a possible relief option for some student loans. There is no explanation if the possible forbearance is a deferral of payment or forgiveness and if the later, what tax treatment applies.[21]

In contrast, within three weeks of enactment of the federal CARES Act, Wisconsin enacted A.B. 1038 (Chapter 185), which includes conformity to several of its code and non-code provisions. While the legislative language, with reference to numerous section numbers of the CARES Act and numerous other provisions, was confusing, the DOR provided in Guidance Document Number 100265 a summary of less than 300 words clearly listing what CARES Act provisions the state conforms to. That guidance included a phone number and email address to use for questions and comments.[22] It is a good example of the issuer considering what information users needed and how to explain it simply. Following is an excerpt from that guidance:

> These provisions apply for Wisconsin tax purposes at the same time as for federal income tax purposes.
>
> - Section 1106 – relating to the exclusion from income for the cancellation of small business loans
> - Section 2202 – relating to the waiver of penalties for early withdrawals from qualified retirement plans
> - Section 2204 – relating to an above-the-line deduction for up to $300 of charitable cash contributions
> - Section 2205 – relating to increased limitations on charitable contribution deductions
> - Section 2206 – relating to an exclusion from income for payments an employer makes for an employee's student loans
> - Section 2307 – relating to the classification of qualified improvement property for depreciation purposes.

[19] P.L. 116-136.

[20] California Executive Order N-57-20 (Apr., 23, 2020).

[21] Office of Gov. Gavin Newsom, "Governor Newsom Announces Additional Relief for Californians Impacted by COVID-19" (Apr. 23, 2020).

[22] Wisconsin Department of Revenue, Guidance Document No. 100265, Wisconsin Adopts Tax Relief in the Federal CARES Act.

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Another good example of providing information that is simple and direct is the Nebraska DOR's release on its FAQ on income tax changes because of the pandemic. In under 130 words and in a box highlighted with a dark blue background, the DOR explains that FAQ are only advisory but are binding on the DOR, that they can change frequently, and that users can sign up to get updated information emailed to them on topics of interest, with a link to sign up.[23]

Following are suggestions to help ensure that both legislative and administrative tax guidance that people need to understand quickly meet the tax principle of certainty.

- In drafting, focus on the needs of users who are stressed and pressed for time and need assurance that they understand how to obtain the provided relief without risk of error and possible loss of the relief. Test the language out with colleagues before passing the legislation or posting administrative guidance. If possible and appropriate, be sure the purpose and goal are provided to help in understanding. Consider the example set by General Motors CEO Mary Barra, who reduced the company's 10-page dress code to two words: "dress appropriately."[24]
- For changes to existing statutes, provide a "track changes" version of the new legislation so tax professionals already familiar with existing law can readily see the changes.
- Many of the federal COVID-19 tax changes were not made to the IRC (non-code provisions), but instead are in the public law only. This leaves confusion in states with rolling conformity as to whether any of these non-code provisions were automatically conformed to. Provide the answer as soon after enactment of the federal legislation as possible. Also, some tax preferences, such as the paid leave credits of the FFCRA, require that the credit be added back to gross income to avoid a double benefit. States need to let taxpayers know as soon as possible whether that adjustment also affects state taxable income so that estimated tax payments can be computed correctly. Again, thinking about the changes from the perspective of taxpayers and their advisers should help in achieving certainty.
- Tax agency websites need to be updated, ideally with a single site rather than spread across multiple websites. Users need to know how to reach the agency, the status of audits and collection activities already underway before shutdown orders, and what deadlines are extended. All the information needs to be as clear as possible with no detail overlooked that will cause confusion and perhaps costly mistakes and missed opportunities for tax benefits. Include a link asking the reader to share additional questions they have.
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III. Think Broadly in Providing Assistance, but Consider Hidden Messages

[23] Nebraska Department of Revenue, Frequently Asked Questions About the Income Tax Changes Due to the COVID-19 National Emergency.

[24] Sam McEachern, "How General Motors CEO Mary Barra Changed the Company's Dress Code for the Better," GM Authority, June 17, 2020.

How can governments provide financial relief to distressed individuals and businesses at minimal costs to current and future budgets? What creative techniques can be used to help taxpayers satisfy tax liabilities when their financial needs may have drastically changed, such as no longer needing all the physical space they once used? The following are suggestions for out-of-the-box thinking for financial assistance. For many of these, it is important to consider any hidden message, such as encouraging actions that may be risky to employee health.

A. Use Existing Tax Dollars Rather Than Create New Tax Breaks if Possible

Identifying how existing tax breaks can be accelerated is a good start in providing financial assistance. For example, let taxpayers with credit carryforwards treat all or part of them as refundable in the current year. Allow for some carryback of current year NOLs. While these efforts will harm current year budgets, they are better for the long term relative to creating new tax breaks. If the state does not allow for the sale of tax credits to other taxpayers, it should be considered to help use existing tax breaks and provide immediate cash, rather than creating new tax breaks.

B. Accountability

While it is hoped that all taxpayers will use tax relief wisely, clawbacks should be considered such as when a company uses relief funds for a stock buyback.[25] Clawbacks and similar accountability measures are needed for any direct aid or tax credits intended to reward desired pandemic behavior such as employee retention, performing extra cleaning, and providing personal protective equipment (PPE) to employees.[26]

C. Allow for Tax Payments in Ways Other Than Cash

Some businesses may suffer significant losses because of curtailing operations and struggling to meet fixed costs. Some businesses may find they have unneeded assets, such as office, production, and retail space and vehicles, because of moving to more virtual and work-from-home (WFH) operations during the pandemic and perhaps afterward.

Consider ways that taxpayers with unneeded assets might pay their income and other tax liabilities with this property. State and local governments may find immediate needs for some of the real property, such as for COVID-19 testing or treatment and for housing homeless individuals. Some of the properties might be in better condition than existing government office space and possibly reduce the need for future building upgrades. This transfer of property might be helpful to some businesses unable to sell excess property because of the pandemic and uncertainty

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[25]For example, H.R. 6339 (116th Cong.) prohibits a corporate stock repurchase during the specified emergency period and the following 120 days.

[26]For example, H.R. 6827 (116th Cong.) requires corporations receiving federal COVID-19 financial aid to provide 14 days of paid leave to all workers, pay employees a minimum wage of $15 per hour and limit CEO and top executive pay.

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potential buyers face. Taxpayers should be reminded of the tax consequences of using noncash property to satisfy tax liabilities.

D. Design Any New Tax Breaks to Help Liquidity and COVID-19 Relief

Tax systems should be regularly reviewed to ensure they reflect how we live and do business and meet principles of good tax policy. Some of the pandemic changes to how we work and do business are temporary. One significant temporary change is the widespread need for PPE. Given the importance of PPE and financial difficulties faced by so many individuals and businesses, as well as governments, a temporary sales tax exclusion is an appropriate tax break. That exemption also removes the cost and compliance complexity when taxpayers donate PPE. Indiana Executive Order 10-05 (March 19, 2020) requires the DOR to not impose use tax on manufacturers who donate medicine, medical supplies, and other goods to help fight COVID-19.

Any new tax breaks should be temporary and aim to reduce new costs of preventing and fighting the pandemic. For example, A.B. 2496 introduced in California (but not enacted) would provide an income tax credit for the purchase of cleaning and sanitizing supplies for use at business locations to help prevent transmission of COVID-19.

Additional targeted relief can be provided to extend due dates of debts owed to the state (beyond tax debts) and possibly also waive interest for a few months. Qualification for this relief should be automatic or only require a simple, online form. For example, Indiana Executive Order 10-05 provided a 60-day waiver of penalties for property taxes due on May 11, 2020.

E. Watch for Dangers in New Tax Breaks

The $600-per-week federal unemployment benefit provided by the CARES Act helped many individuals who lost their job when their employer had to shut down or reduce operations or when telework was not a feasible option. This benefit though also served as a disincentive to return to work. Idaho Gov. Brad Little (R) offered one-time return-to-work bonuses of $1,500 to full-time workers and $750 to part-time employees. The funds were distributed first come, first served once the employee returned to work.[27] At the federal level, S. 4031, American Tax Rebate and Incentive Program Act, proposed to compensate for some travel expenses of individuals traveling more than 50 miles from their home via a refundable credit of up to $4,000 per taxpayer plus $500 per child under age 17.

While these types of proposals are well intentioned and aim to help both workers and the economy, they pose risks that might be more costly than the grant or tax credit. These proposals can encourage behavior that is risky to the main party and those they encounter.

[27] Idaho Office of the Governor, "Gov. Little to Offer Back-to-Work Cash Bonuses" (June 5, 2020).

In contrast, Sacramento, California, considered paying some infected workers $1,000 to stay home.[28] This can help both the worker and those who will not get exposed to the virus when the worker shelters in place rather than goes to work. As noted in Section VIII of this article, the need to provide a cash incentive for a sick person not to go to work highlights sick leave inequities that exist in today's workforce.

Certainly, caution and data are needed to help with predictions on what all might happen in encouraging behavior that could further spread the virus. Needed resources include education on COVID-19 symptoms and risk factors, where to get tested, and resources to help individuals who cannot go to work because they are sick or exposed or at high risk of complications if they get sick. Obviously, governments need to be clear on messaging, including direct messages and those indirectly being made by some law changes, including tax laws.

F. Promote Use of Not-So-Obvious Resources

Governments should search broadly to find existing rules that can help individuals and businesses but that might be overlooked. For example, reminding individuals about the CARES Act recovery credit (referred to as economic impact payments by the IRS) and the earned income tax credit can help. Also, encourage individuals and businesses to review unclaimed property lists for possible assets to claim.

Promoting government aid programs and what local charities can provide will help because many individuals and businesses are unaware of the resources available to them. For example, the San Jose Community Development Block Grants Microenterprise Grant Program offers awards up to $15,000 to microenterprises to help with COVID-19 expenses.[29] Also, some companies, such as Facebook, offer grants to help small businesses.

There are also numerous websites such as Craigslist and FreeCycle that help people with excess resources such as boxes, office supplies, and furniture sell them or give them to others. These sites can be promoted by governments to help those in need, particularly when someone might have face masks or other PPE. Governments should also consider creating or co-sponsoring these types of websites as an efficient way to help those with extra resources get them to community members who need them.

[28]Tony Bizjak, "Sacramento May Pay People $1,000 to Stay Home When Infected by Coronavirus," *The Sacramento Bee*, Aug. 25, 2020.

[29]Many cities may have these funds through government or charitable organizations. For example, *see* information on the San Jose Community Development Block Grants.

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New systems are needed to better distribute assets so what one person or business doesn't need can easily be given to others who need them rather than going to waste, particularly in times of crisis.

IV. Sheltering in Place Restricts Activity — But Tax Implications Should be Simple and Clear

The pandemic forced a growing trend of the past several years of remote work. According to one pre-pandemic survey, remote work in the United States increased almost 8 percent from 2016 to 2017, while it increased 91 percent in the last 10 years.[30] Another study found that about 16 percent of employees will continue to WFH even after the pandemic ends.[31]

Some companies, including Microsoft, Twitter, and Facebook, announced that WFH would be a permanent change for much of their workforce. Facebook CEO Mark Zuckerberg expects that by 2030, half of the company's employees (about 22,000) will WFH, with new technologies used to help build employee connections.[32] WFH might be for part of the work week for some employees and permanent for others. WFH strategies have created new terms such as "remote first" to allow most employees the option to work off-site or have a mix of office work and WFH.[33]

A result many companies and employees faced with the shelter-in-place and WFH conditions is that some employees were working in states other than where their normal workplace is located. This raised tax issues both for employers and employees. Employers may have created nexus in

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[30]Beth Braccio Hering, "Remote Work Statistics: Shifting Norms and Expectations," Flexjobs (Feb. 13, 2020).

[31]Kristen Senz, "How Much Will Remote Work Continue After the Pandemic?" Harvard Business School (Aug. 24, 2020).

[32]Jeff Horwitz, "Facebook to Shift Permanently Toward More Remote Work After Coronavirus," *The Wall Street Journal*, May 21, 2020. *Also see* Ben Gilbert, "Microsoft Will Let Employees Work From Home Permanently," World Economic Forum (Oct. 13, 2020).

[33]*See, e.g.,* Coinbase Inc. blog post by CEO Brian Armstrong, "Post COVID-19, Coinbase Will Be a Remote-First Company" May 20, 2020.

states where they had not been subject to tax before. Employers also needed to register for employment tax purposes if not already done.

Employees might have learned that their tax consequences changed so that they could be subject to tax both in their WFH state and the state of their normal office location. Some of these employees might not be aware of new tax consequences until they receive a notice of tax due. For example, New Hampshire residents who normally work in Massachusetts discovered via publication of a DOR final rule in October that if they worked for a Massachusetts employer while working from home in New Hampshire, they still owed Massachusetts income tax under the state's sourcing rule.[34] That led Gov. Chris Sununu (R) of New Hampshire, a state without an income tax, to suggest filing a lawsuit with the U.S. Supreme Court opposing the action.[35]

An October 2020 AICPA/Harris poll of remote workers found that 55 percent did not know about the possible tax consequences of working from a new state. Also, almost half of those surveyed did not know that the tax rules on remote work were not the same among all states.[36] Variances among states increased during the pandemic as some states provided temporary relief in which, for example, for a specified number of days, the remote worker would be treated as not having changed their work location.[37]

The details of state actions and varying treatment both before and during the pandemic are not further discussed here. *Tax Notes State* has published several articles on how remote work affects employers and employees among the states.[38]

Suggestions for dealing with the sourcing and nexus issues for employers and employees and the states include the following.

1. States need to issue clear guidance on what are usually complex rules for both businesses and individuals. An explanation of the relevant rules, and any special rule adopted for the pandemic, should be readily available on the DOR's website. For employers, the information needs to address the nexus threshold for each type of tax imposed by the state. Possible tax credits and other preferences potentially available to filers should be noted. Information for individuals must clearly explain the filing obligation such as which return to use, filing thresholds, and if the state has reciprocity agreements with other states.
2. States should work together to develop more consistent rules on when a remote worker (employee or sole proprietor) has tax obligations in the state. Technology

[34] 830 Mass. Code Regs section 62.5A.3: Massachusetts Source Income of Non-Residents Telecommuting Due to the COVID-19 Pandemic (Oct. 16, 2020).

[35], "NH To Challenge MA Taxation of NH Remote Workers in U.S. Supreme Court" (Oct. 16, 2020).

[36], "AICPA/Harris Poll Reveals Many Taxpayers Unaware of State Tax Liabilities Related to Working Remotely" (Nov. 5, 2020).

[37] Various regularly updated lists of state actions are available, such as AICPA's State Tax Filing Guidance for Coronavirus Pandemic.

[38] *See*, *e.g.*, Kathleen K. Wright, "Tax Ramifications of Staying Home," *Tax Notes State*, Apr. 27. 2020, p. 505.

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solutions should be considered to make determinations and e-filing as simple as online banking or shopping. Congress has long-standing proposals for state-level mobile workforce rules, as well as to address rules for the pandemic, such as the Remote and Mobile Worker Relief Act of 2020.[39] States should be ready to provide input to their elected officials on this type of legislation.

V. Tax Relief Needed This Year and Later — Be Forgiving

During the pandemic, all taxpayers have faced and will continue to face for some time, challenges in tax compliance and controversy. New laws and guidance from all levels of government have mostly been complex with guidance lacking and changing. Financial challenges mean that many businesses do not have as many human resources to help understand new tax and nontax rules. Also, financial challenges will result in outstanding tax debts for many taxpayers.

Tax agencies need to have a disaster mindset today and for years to come. That is, they cannot forget the challenges taxpayers faced for most of 2020 despite the tendency that time often helps us forget the panic, seriousness, and confusion that existed during the crisis. In a crisis, errors are easily made, and financial decisions may have been driven more by emotion (such as helping a relative or employee) than law (making sure legal obligations were satisfied by stated due dates). Many businesses were dealing with myriad confusing rules during the pandemic, including state laws on layoff, family, and sick leave, testing employees for COVID-19, and obtaining PPE that was often difficult or impossible to obtain when needed.

In an April 2020 letter to the *Tax Notes State* editor, Kip Dellinger, CPA, described the challenges and solution well by highlighting that the IRS should not try to return to "business as usual" for years.[40] This is also true for state tax agencies. Examination of 2020 tax returns are bound to include errors because of the number of changes, confusion over federal-state conformity, and lack of complete guidance. Reasonable cause for penalty relief should be a given in most cases. Collection issues will also be around for years because of the financial crisis many individuals and businesses faced with some businesses not surviving the pandemic.

To best help taxpayers, state lawmakers and tax agencies should say now that reasonable cause will be the starting point for penalty waivers or for not assessing them in the first place. Substantial compliance should be viewed liberally with state tax auditors regularly reminded for years about the panic and confusion that accompanied most tax and other changes of 2020. Collection actions should be extended, and as noted earlier, noncash assets no longer needed by businesses should be accepted easily as allowable payment options.

VI. Tough Financial Times Ahead – Don't Hide It, Be Transparent

[39]Sen. John Thune, R-S.D., sponsor of S. 3995, stated reasons for the bill in an op. ed.: "State Taxes Shouldn't Be Another Pandemic Worry," *The Wall Street Journal*, June 17, 2020.

[40]Kip Dellinger, "Dear IRS: It Shouldn't Be Business as Usual!" *Tax Notes State*, Apr. 20, 2020, p. 409.

All levels of government were hit hard by the pandemic with reduced revenues for fiscal year 2020 and beyond, along with increased spending to address new and increased expenditures. Governments faced increased costs for their employees to enable WFH, extra cleaning of facilities, and greater use of sick and family leave. Rainy day funds were tapped in many states.[41] Increased spending needs at the federal level with new expenditures and increased interest expense from significant new borrowing means state and local governments might not get much more assistance from the federal government.[42]

As states seek to meet budget demands but are reluctant to increase taxes in difficult financial times, budgets and rainy day funds will be severely challenged. Tax increases of some degree are inevitable and, as noted in Section I, could come from closing loopholes and removing special rules that are not required elements of some taxes (such as various sales tax exemptions for personal consumption).

State and local governments should be transparent about their fiscal challenges to avoid surprises and disappointment to resident individuals and businesses. People are keenly focused on their own problems, so they are unlikely to have time to devote to figuring out on their own whether their governments are experiencing problems and the degree of budget issues. Clearly laying out the issues is prudent.

An example of that transparency is an April 4, 2020, press release by the California State Association of Counties. It explains why counties could not delay the due date for property taxes. While noting they would exercise their authority to waive penalties for those unable to pay, they noted that the tax revenue is crucial to local governments including schools. Per the statement: "Delaying the April 10 property tax payment would take tens of billions of dollars away from local government, create cash flow problems, and cause some to default on their loans, which would have significant long-term effects on all local agencies in California."[43]

Another transparency example — also from California — is a fiscal update from the Department of Finance. In bullet points, it lays out that almost 478,000 unemployment claims were filed in the first week of May and personal income tax collections are expected to be 9 percent lower than originally projected. The document included a link to a 10-page presentation with pie charts reviewing a normal budget and highlighting expected budget deficits because of the pandemic.[44]

Will many people find the agency websites with documents that aim to make budget problems more transparent? Likely not. Governments need to continue efforts to push information out via social media, posting information on frequently visited sites such as for driver and vehicle license renewals, and encouraging elected officials and schools to help in distributing information on their

[41]*See* National Conference of State Legislatures, State Fiscal Responses to Coronavirus (COVID-19) (June 30, 2020).
[42]Deficit spending increased from $984 billion in fiscal 2019 to $3.1 trillion in fiscal 2020. Congressional Budget Office, "Monthly Budget Review: Summary for Fiscal Year 2020" (Nov. 9, 2020).
[43], "Joint CSAC / CACTTC Statement on COVID-19 and the April 10 Property Tax Deadline" (Apr. 4, 2020).
[44]California Department of Finance, "Fiscal Update" (May 7, 2020).

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websites. The information provided needs to be simple and direct with links to more details for those who want them. The goal is to help people understand the fiscal issues and what is being done, setting expectations for current and future budgets and being transparent about fiscal challenges.

VII. Embrace 21st Century Technologies

The pandemic forced tax agencies to embrace modern technologies that many taxpayers were already accustomed to as some of these tools, such as digital signatures, originated in the last century.[45] A good deal of tax administration and compliance is paper based even with e-filing, which has been around since the late 1990s. Yes, paper based! Consider how e-commerce does not involve completing an electronic version of an order form, yet tax filing still requires completion of what continues to be a paper-based form usually requiring input from other paper-based forms such as Form W-2 and Forms 1099. Also, many federal and state tax forms cannot be e-filed.[46]

While many states have moved toward online taxpayer accounts, they tend to not be as robust or easily navigable as online banking and e-commerce websites and apps. The IRS and likely all states still use some forms that require a wet signature.

Online filing, document transfers, payments, and digital signatures allowed by the IRS and many state tax agencies were quickly implemented during the pandemic but mostly on a temporary basis.[47] Given the number of taxpayers engaged in online shopping, banking, and education, there are many people eager for permanent online options for tax compliance.

New online and digital activities started or temporarily expanded during the pandemic by state tax agencies need to move to a permanent basis post-pandemic. Lessons learned from these new efforts must be considered in aiming to move to completely online systems.[48] In addition, to benefit from economies of scale and compatible systems, states and the IRS must work together to create the 21st century technology-based tools for modern tax compliance.

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[45]For example, the Electronic Signatures in Global and National Commerce Act (P.L. 106-229) was enacted June 30, 2020. Amazon.com launched in 1994 and eBay in 1995.

[46]The IRS national taxpayer advocate's midyear report also notes the paper-based system: "Not all operations will function seamlessly in a remote environment, but the IRS will be better positioned if it is not such a paper-based organization. Accordingly, the National Taxpayer Advocate recommends that the IRS prioritize the modernization of its technology as well as increase the use of digital communications and the electronic production of documents in a secure environment." National taxpayer advocate, "Fiscal Year 2021 Objectives Report to Congress," Systemic Advocacy Objectives report, at 44 (2020).

[47]For example, *see* Maryland Tax Alert 04-20, Temporary Acceptance of Digital Signatures. *Also see* Treasury memorandum of June 12, 2020, on "implementing a temporary deviation" for approval to accept images of signatures and digital signatures.

[48]While compliance systems should be completely online, there will continue to be a need for other approaches because not all taxpayers use 21st century technologies yet.

Online tax filing should consider other online systems that have replaced paper, such as those used in banking. The focus should be on data and where it originates and how to get it in a digital form that allows it to be efficiently and safely used to compute tax liabilities. For example, rather than focus on the Form W-2, the data on the W-2 and its location should be the focal point. With many workers being paid via automatic bank deposit, a digital file already exists. Many employees also do not receive paper pay stubs from their employer but must instead access them electronically. This digital data should be made available in a manner for taxpayers to easily access it to feed into the tax preparation software they use. Similarly, business taxpayers should set up their digital accounting records to be easily converted to a digital format that feeds into the tax preparation software, with appropriate book-tax adjustments made by the software. These systems would allow taxpayers to calculate income tax liabilities daily, and regularly ensure tax liabilities are covered, such as with a direct link to their bank account or credit card. Due dates would eventually not be necessary in this tech-driven system. Online taxpayer accounts should also end the need to file amended returns. Instead, taxpayers access their secure account to make necessary changes, which are then reviewed online by the tax agency to be accepted or declined.

Beyond eliminating the need for due dates for many filings, use of 21st century technology should also end the issue of unclaimed tax refunds (such as from individuals not claiming overpaid taxes from wage withholding) and missing mailed notices that either don't get delivered or are sent to an incorrect address.[49]

A starting point beyond lessons learned from use of new technologies during the pandemic is to also obtain information from taxpayers. A recent example of such an effort from the U.S. Department of the Treasury is a request from the Office of the Comptroller of the Currency. It seeks public input on specific questions to help ensure that regulatory frameworks enable "banks to adapt to rapidly changing trends and technology developments in the financial marketplace to meet customers' evolving needs while continuing to operate in a safe and sound manner." Questions include ones on how new technologies such as the blockchain, artificial intelligence, and payment systems can be used to improve banking operations.[50]

VIII. The Pandemic Highlights Inequities — Plan to Remove These from Tax Systems

While millions of individuals sought unemployment compensation during the pandemic, others continued to collect their regular pay, including in safe WFH environments. And some ultra-wealthy became even wealthier. For example, about 40 million workers in the United States sought unemployment compensation assistance, while billionaires experienced about a $500 billion increase in net worth.[51]

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[49] *Also see* Nellen, "Change in Mindset Needed to Move Tax Compliance Into the Modern Era," *State Tax Notes,* May 22, 2017, p. 785.
[50] Treasury, Docket ID OCC–2019–0028 (July 7, 2020), F.R. 40827.
[51] Hiatt Woods, "How Billionaires Saw Their Net Worth Increase by Half a Trillion Dollars During the Pandemic," *Business Insider*, Oct. 30, 2020.

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A crisis such as the pandemic can highlight long-standing problems, such as inequities regarding insurance coverage, access to paid sick and family leave, wide and growing income and wealth gaps, and access to affordable health care. Several of these inequities exist in our tax systems or are exacerbated by existing tax rules. Now is a time to start discussing and addressing these issues and not create greater inequalities by new tax law changes.

States should find tax system inequities and identify how to eliminate them. Existing data on tax incidence by income quintiles, which most states likely gather for the U.S. Department of Commerce[52] and their own needs, is a good starting point. Hearings on the topic should help to identify more inequities as well as solutions for eliminating them.

Tax inequities include income exclusions, such as for employer-provided health insurance, that provide greater tax savings to higher-bracket individuals who also likely receive greater benefits from their employers. The cost of this tax expenditure, likely one of the largest for each state, could be reduced with the savings used to distribute health care subsidies more equitably to all individuals, not just employees with employer-provided health insurance.[53]

Homeowners with mortgages receive tax savings greater than what renters receive. This subsidy, delivered via a deduction, is also upside down in providing greater savings to higher-bracket taxpayers who are also likely to have a larger mortgage than lower-income individuals. Individuals with the largest mortgages that can produce deductible interest are also least in need of this subsidy. For example, those individuals can likely afford a $1 million dollar home even without the mortgage interest deduction or if not, they can buy a slightly less expensive home and still live in a manner not possible for the vast majority of individuals.

Similar inequities exist in the tax system with other tax preferences (tax expenditures) that primarily benefit higher-income taxpayers and further increase their wealth. These special rules include pension contributions and income deferral, not taxing capital gains at death, lower capital gain rates used in some states, and exclusion for municipal bonds, gifts, life insurance, and various fringe benefits beyond health insurance.

States should also look at special tax rules for all their taxes. For example, are charitable organizations provided sales and property tax breaks even if they do not mostly aid local communities? Do sales and use tax rules allow residents to avoid sales tax on expensive airplanes and other vehicles through special provisions on how the vehicle is purchased or delivered?

Efforts should also be directed at addressing new inequities created by the pandemic that might be further exacerbated by tax rules or that might hurt future tax collections. For example, many high school and college graduates entering the workforce during the pandemic saw reduced

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[52]The U.S. Department of Commerce's Census Bureau provides a great deal of federal, state, and local tax data, *see* U.S. Census Bureau, Government Taxes.

[53]Also suggested in Nellen, "Looking Ahead: Supporting the Modern Workforce," *Tax Notes State*, Dec. 16, 2019, p. 913.

opportunities that might have long-term consequences to them and state revenues. Will new aid programs help these individuals catch up?

State and local governments should also identify agencies beyond the DOR to help identify and reduce tax system inequities. If Chicago's 2019 creation of an Office of Equity and Racial Justice led by a chief equity officer[54] becomes a trend in other state and local governments, tax inequities should also be an agenda item for that office.

Beyond economic inequities in the tax system, recent attention has also been directed at racial and gender inequities[55] tied to tax rules and government spending programs. That is, both direct and indirect spending (such as through tax expenditures) should be evaluated as part of a state's efforts to improve tax systems by making them fairer and more equitable.

IX. Engage in Identifying and Actualizing Lessons Learned From Tough Times

The IRS national taxpayer advocate's midyear 2020 report summarized this topic well — ensuring we identify and act upon lessons learned from the pandemic.

> Once the IRS resumes normal operations, it is crucial to evaluate the challenges the agency faced in providing taxpayer services and conducting mission-critical functions including compliance initiatives during the COVID-19 crisis. The IRS must prepare for the next national emergency, based on the lessons it learned from this crisis. While the circumstances of the next incident will differ, the IRS can take actions now to ensure that the agency's core operations will continue in the face of similar challenges. This will require each function taking a hard look at what worked and what did not in the face of this unexpected and unprecedented event.[56]

In preparation for post-pandemic analysis though, lots of notes must be taken now on what worked and did not work, what could not be accomplished because of lack of resources, and what was learned by other government agencies and businesses.

The evaluation and work on lessons learned and planning to put those lessons into action does not have to wait until after the pandemic. For example, the Chicago Recovery Task Force issued a 104-page report in July. Per the report's introduction, the mayor convened this thought leadership group:

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[54]Nate Berg, "'It's Stressful, Lonely Work': The Newest Job at City Hall is Also the Most Important," *Fast Company*, Aug. 3, 2020.

[55]*See*, *e.g*., Tax Policy Center, "Racial Disparities and the Income Tax System" (Jan. 30, 2020); and Michelle Harding, Grace Perez-Navarro, and Hannah Simon, "In Tax, Gender Blind is Not Gender Neutral: Why Tax Policy Responses to COVID-19 Must Consider Women," OECD Centre for Tax Policy and Administration (June 1, 2020).

[56]*See* "Fiscal Year 2021 Objectives Report to Congress," *supra* note 46.

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> to keep our city moving forward despite the far-ranging impacts of this disease. Our objective was as bold as it was simple: Nothing less than the most breathtaking recovery effort Chicago has ever seen. To succeed, we knew there could be no half measures and no cutting corners. It would require bold, visionary action that would build on the efforts already taken to expand equity and opportunity over the previous nine months.[57]

A "lessons learned" endeavor must also consider how business and individual activities have changed. For example, increased WFH efforts can easily result in empty office space and declined property values and property tax collections. Fewer commuters means added pressure on mass transit funding, reduced parking revenues on city-owned lots, and even reduced revenue from traffic violations. With more employees working from home and fewer in business-owned buildings, business license fees, particularly those tied to payroll or number of employees in the city, may need to be reevaluated. College towns need to consider if populations will decrease with more students permanently participating remotely and consequently adversely affecting local tax revenues.

The pandemic likely changed a variety of daily activities permanently. This includes how people pay for goods and services such as with electronic funds and certainly with less tangible currency. Those practices will be expected when people pay for government services. Similarly, many people will expect to continue to interact with government employees virtually rather than in person at a government office. Consideration should be given to how this affects tax agencies and the work of their employees.

In looking ahead to be ready for the next disaster, governments should evaluate how rainy day funds are replenished and if changes are needed. Since future emergencies are likely to involve distribution of funds to residents such as for unemployment compensation or recovery rebates, how can it be done efficiently via technology. What can be done now to provide access to funds for individuals who are unbanked? How do new financial technologies help solve these challenges?

How can all levels of government share the lessons learned and be informed of actions of one agency that will help another? Ideas for sharing information is crucial as innovations in one agency can easily affect and help other agencies. In addition, governments will need to find and use information gathered by businesses and others and obtain input from all stakeholder groups.

X. Conclusion

The pandemic challenged and continues to challenge us all in many ways. All government systems from public health to education to transportation to taxes are affected. The severity and wide reach of the pandemic will change our day-to-day activities and perspectives permanently in many ways. Those changes, along with financial recovery post-pandemic, will affect tax systems and tax

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[57] City of Chicago, "Recovery Task Force Advisory Report: Forward Together Building a Stronger Chicago" (July 9, 2020).

policy. Endurance is a good focal point for tax considerations. Attention is needed now to deal with numerous tax law changes that will linger on in audits and litigation for the next few years. Many lessons are learned from the current crisis, and efforts are needed now and over the next few years to be sure tax systems endure to reflect our changed economy, business practices, and lifestyles. Hopefully, ideas laid out in this article will help policymakers and taxpayers in this learning and endurance endeavor.

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