INTRODUCTION: Legislative Recommendations

Section 7803(c)(2)(B)(ii)(VIII) of the Internal Revenue Code (IRC) requires the National Taxpayer Advocate to include in her Annual Report to Congress, among other things, legislative recommendations to resolve problems encountered by taxpayers.

The table that follows this introduction summarizes congressional action on recommendations that the National Taxpayer Advocate proposed in her 2001 through 2017 Annual Reports.[1] The National Taxpayer Advocate places a high priority on working with the tax-writing committees and other interested parties to try to resolve problems encountered by taxpayers. In addition to submitting legislative proposals in each Annual Report, the National Taxpayer Advocate meets regularly with members of Congress and their staffs and testifies at hearings on the problems faced by taxpayers to ensure that Congress has an opportunity to receive and consider a taxpayer perspective. Last year, for the first time, the National Taxpayer Advocate included with her Annual Report a separate volume, *The National Taxpayer Advocate Purple Book*, which proposed 50 legislative recommendations intended to strengthen taxpayer rights and improve tax administration. The National Taxpayer Advocate has decided to make the Purple Book a recurring addition to her Annual Report. This year's Purple Book contains a concise summary of 58 legislative recommendations, most of which have been made in detail in our prior reports, but others are presented for the first time.[2] Each recommendation is presented in a format similar to the one used for congressional committee reports, with "Present Law," "Reasons for Change," and "Recommendation(s)" sections. We hope for this to be a user-friendly resource for members of Congress and their staffs.

The following discussion highlights legislative activity during the second session of the 115th Congress relating to the National Taxpayer Advocate's proposals.

Bipartisan Budget Act of 2018

On April 4, 2017, Representative Larson and sixteen other Representatives introduced this legislation, which became Public Law No. 115-123 on February 9, 2018, that enacted one of the National Taxpayer Advocate's prior proposals.[3]

- **Hold Taxpayers Harmless When the IRS Returns Funds Levied From a Retirement Plan or Account.**[4] This provision would hold individuals harmless on improper levies on individual retirement accounts.

1 An electronic version of the chart is available on the TAS website at www.TaxpayerAdvocate.irs.gov/Reports. The chart lists all legislative recommendations the National Taxpayer Advocate has made since 2001 and identifies each section of the Internal Revenue Code (IRC) affected by the recommendations.

2 *See* National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (Dec. 2018).

3 Bipartisan Budget Act, Pub. L. No. 115-123, § 41104, 132 Stat 64, 155-156 (2018).

4 National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 41-42 (*Hold Taxpayers Harmless When the IRS Returns Funds Levied From a Retirement Plan or Account*) (Dec. 2018).

Taxpayer First Act

On April 10, 2018, Representative Jenkins and four other Representatives introduced this legislation, which passed the House by a unanimous vote of 414-0.[5] The Taxpayer First Act would enact many of the National Taxpayer Advocate's prior proposals.

- **Matching Grants Program for Return Preparation.**[6] This provision would establish a Volunteer Income Tax Assistance (VITA) matching grant program.
- **Referrals to LITCs.**[7] This provision would allow officers and employees of the Department of Treasury to advise taxpayers of the availability of and the eligibility requirements for receiving assistance from Low Income Taxpayer Clinics (LITCs). It would also allow such officers and employees to provide to taxpayers the addresses and contact information for these clinics.
- **Waiver of Installment Agreement Fees for Low Income Taxpayers.**[8] This provision would waive any fee otherwise required with the submission of an offer in compromise (OIC) for low income taxpayers. While this provision does not mention installment agreement fees as the title of this recommendation suggests, our past Most Serious Problems (MSPs) and Legislative Recommendations (LRs) that discussed this recommendation extend the recommendation to the OIC and user fees that this provision waives.
- **Restrict Tax Return Disclosures to Necessary Content.**[9] This provision would limit the redisclosures and uses of tax return information to only the express purpose for which consent to use that information was granted. The tax return information shall not be disclosed to any other person without the express permission or request of the taxpayer.
- **Taxpayer Advocate Directive.**[10] This provision would amend IRC § 7803(c) by adding a segment on the power of the National Taxpayer Advocate to issue Taxpayer Advocate Directives (TADs), and that the Administrator of the IRS[11] must modify, rescind, or ensure compliance with a TAD within 90 days of its issuance. The National Taxpayer Advocate may appeal a modification or rescission, to which the Administrator must ensure compliance or provide the National Taxpayer Advocate with a detailed description of the reasons behind making the modification or rescission.

---

5 Taxpayer First Act, H.R. 5444, 115th Cong. (2018).

6 National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VTA/TCE Funding: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*); National Taxpayer Advocate 2002 Annual Report to Congress vii-viii.

7 National Taxpayer Advocate 2007 Annual Report to Congress 551-553 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

8 National Taxpayer Advocate 2017 Annual Report to Congress 307-313 (Legislative Recommendation: *User Fees: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights*); National Taxpayer Advocate 2015 Annual Report to Congress 14-35 (Most Serious Problem: *IRS User Fees: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*); National Taxpayer Advocate 2007 Annual Report to Congress 66-82 (Most Serious Problem: *User Fees: Taxpayer Service For Sale*); National Taxpayer Advocate 2006 Annual Report to Congress 141-156 (Most Serious Problem: *Collection Issues of Low Income Taxpayers*).

9 National Taxpayer Advocate 2007 Annual Report to Congress 554-555 (Legislative Recommendation: *Consent-Based Disclosures of Tax Return Information Under Internal Revenue Code Section 6103(c)*).

10 National Taxpayer Advocate 2016 Annual Report to Congress 39-40 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

11 The bill modifies the title of the "Commissioner of Internal Revenue" and replaces it with the "Administrator of the Internal Revenue Service". *See* Taxpayer First Act, H.R. 5444, 115th Cong. § 11401 (2018).

- **Single Point of Contact.**[12] This provision would require the Secretary of the Treasury to establish and implement procedures to create a single point of contact at the IRS for taxpayers whose tax return has been delayed or adversely affected by tax-related identity theft.
- **Strengthen the Independence of the IRS Office of Appeals.**[13] This provision would establish within the IRS a new office, the IRS Independent Office of Appeals.
- **Tax Court Review of Request for Equitable Innocent Spouse Relief.**[14] This provision clarifies the standards and scope of Tax Court review for equitable innocent spouse relief.
- **Clarify that the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) is *De Novo*.**[15] This provision clarifies that any review of a determination made under IRC § 6015(f) (equitable relief for innocent spouses from joint and several liability on a joint return) will be reviewed *de novo* by the Tax Court.

Taxpayer First Act of 2018

On July 19, 2018, Senator Hatch and thirteen other Senators introduced this legislation.[16] This Act includes several changes and additions from the House version of the bill. While this Senate version would remove some of the prior National Taxpayer Advocate's recommendations that were included in the House bill, this legislation would still enact a number of the National Taxpayer Advocate's prior proposals.

- **Matching Grants Program for Return Preparation.**[17] This provision would establish a VITA matching grant program.
- **Single Point of Contact.**[18] This provision would require the Secretary of the Treasury to establish and implement procedures to create a single point of contact at the IRS for taxpayers whose tax return has been delayed or adversely affected by tax-related identity theft.
- **Notification of Suspected Identity Theft.**[19] This provision would require the Secretary to notify an individual as soon as practicable if there has been or may have been an unauthorized use of their identity, and it can be disclosed without jeopardizing an investigation relating to tax administration. Such notice must include instructions on further steps, including the necessary forms to complete and how to file a report with law enforcement.

---

12 National Taxpayer Advocate 2013 Annual Report to Congress 61 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS is Enjoined From Continuing its Efforts to Effectively Regulate Unenrolled Preparers*).

13 National Taxpayer Advocate 2009 Annual Report to Congress 346-350 (Legislative Recommendation: *Strengthen the Independence of the IRS Office of Appeals and Require at Least One Appeals Officer and Settlement Officer in Each State*).

14 National Taxpayer Advocate 2001 Annual Report to Congress 128-165 (Legislative Recommendation: *Joint and Several Liability*).

15 National Taxpayer Advocate 2011 Annual Report to Congress 531-536 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinizations Under Internal Revenue Code Section 6015(f) is De Novo*).

16 Taxpayer First Act of 2018, S. 3246, 115th Cong. (2018).

17 National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VTA/TCE Funding: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*); National Taxpayer Advocate 2002 Annual Report to Congress vii-viii.

18 National Taxpayer Advocate 2013 Annual Report to Congress 61 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS is Enjoined From Continuing its Efforts to Effectively Regulate Unenrolled Preparers*).

19 National Taxpayer Advocate 2011 Annual Report to Congress 48-74 (Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burdens on Taxpayers and the IRS*).

- **Increase Preparer Penalties.**[20] This provision would increase penalties for improper disclosure or use of information by preparers of tax returns.
- **Tax Court Review of Request for Equitable Innocent Spouse Relief.**[21] This provision clarifies the standards and scope of Tax Court review for equitable innocent spouse relief.
- **Clarify that the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) is *De Novo*.**[22] This provision clarifies that any review of a determination made under IRC § 6015(f) (equitable relief for innocent spouses from joint and several liability on a joint return) will be reviewed *de novo* by the Tax Court.
- **Scannable Returns.**[23] This provision would require that electronically prepared tax returns that are printed and filed on paper include scannable code, which can convert such a tax return to electronic format.
- **Notification to Exempt Organizations.**[24] This provision would require the IRS to provide notice to tax exempt organizations before the revocation of their tax-exempt status for failure to file their tax return for two consecutive years. The notification shall include information about how to comply to avoid loss of tax-exempt status.
- **Restrict Tax Return Disclosures to Necessary Content.**[25] This provision would limit the redisclosures and uses of tax return information to only the express purpose for which consent to use that information was granted. The tax return information shall not be disclosed to any other person without the express permission or request of the taxpayer.
- **Whistleblower.**[26] This provision amends IRC § 7623 to add civil action protections for whistleblowers against retaliation.
- **Referrals to LITCs.**[27] This provision would allow officers and employees of the Department of Treasury to advise taxpayers of the availability of and the eligibility requirements for receiving assistance from LITCs. It would also allow such officers and employees to provide to taxpayers the addresses and contact information for these clinics.

---

20 National Taxpayer Advocate 2003 Annual Report to Congress 270-301 (Legislative Recommendations: *Federal Tax Return Preparers: Oversight and Compliance*).

21 National Taxpayer Advocate 2001 Annual Report to Congress 128-165 (Legislative Recommendation: *Joint and Several Liability*).

22 National Taxpayer Advocate 2011 Annual Report to Congress 531-536 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinizations Under Internal Revenue Code Section 6015(f) is De Novo*).

23 National Taxpayer Advocate 2013 Annual Report to Congress vol. 2 70, 91, 96 (Research Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).

24 National Taxpayer Advocate 2011 Annual Report to Congress 444 (Most Serious Problem: *The IRS Makes Reinstatement on an Organization's Exempt Status Following Revocation Unnecessarily Burdensome*).

25 National Taxpayer Advocate 2007 Annual Report to Congress 554-555 (Legislative Recommendation: *Consent-Based Disclosures of Tax Return Information Under Internal Revenue Code Section 6103(c)*).

26 National Taxpayer Advocate 2015 Annual Report to Congress 409-412 (Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*).

27 National Taxpayer Advocate 2007 Annual Report to Congress 551-553 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

Taxpayer First Act of 2018

On December 10, 2018, Representatives Jenkins and Lewis introduced this legislation.[28] It passed in the House on December 20, 2018. This Act includes several changes and additions from the first House version and the Senate version of the bill, discussed above.[29] It also is nearly identical to Division B of H.R. 88 which was introduced by Representative Brady on December 17, 2018, and passed in the House on December 20, 2018.[30] This legislation would enact many of the National Taxpayer Advocate's prior proposals.

- **Waiver of Installment Agreement Fees for Low Income Taxpayers.**[31] This provision would waive any fee otherwise required with the submission of an OIC for low income taxpayers. While this provision does not mention installment agreement fees as the title of this recommendation suggests, our past MSPs and LRs that discussed this recommendation extend the recommendation to the OIC and user fees that this provision waives.
- **Tax Court Review of Request for Equitable Innocent Spouse Relief.**[32] This provision clarifies the standards and scope of Tax Court review for equitable innocent spouse relief.
- **Clarify that the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) is *De Novo*.**[33] This provision clarifies that any review of a determination made under IRC § 6015(f) (equitable relief for innocent spouses from joint and several liability on a joint return) will be reviewed *de novo* by the Tax Court.
- **Repeal PDC Provisions.**[34] While the National Taxpayer Advocate's legislative recommendation has been to repeal private debt collection (PDC) provisions, she has made additional recent recommendations to establish an income threshold for referral to PDC for taxpayers whose incomes are less than their allowable living expenses or if their adjusted gross income does not

---

28 Taxpayer First Act of 2018, H.R. 7227, 115th Cong. (2018).

29 Taxpayer First Act, H.R. 5444, 115th Cong. (2018); Taxpayer First Act of 2018, S. 3246, 115th Cong. (2018).

30 Taxpayer First Act of 2018, H.R. 88, 115th Cong. (2018). This legislation included a provision not present in the Taxpayer First Act which would enact one of the National Taxpayer Advocate's proposals regarding the development of online accounts to provide services to taxpayers and their preparers, including obtaining taxpayer information, making payment of taxes, sharing documents, and addressing and correcting issues. *See* Taxpayer First Act of 2018, H.R. 88, 115th Cong. § 2102 (2018). *See also* National Taxpayer Advocate 2004 Annual Report to Congress 471-477 (Legislative Recommendation: *Free Electronic Filing for All Taxpayers*).

31 National Taxpayer Advocate 2017 Annual Report to Congress 307-313 (Legislative Recommendation: *User Fees: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights*); National Taxpayer Advocate 2015 Annual Report to Congress 14-35 (Most Serious Problem: *IRS User Fees: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*); National Taxpayer Advocate 2007 Annual Report to Congress 66-82 (Most Serious Problem: *User Fees: Taxpayer Service For Sale*); National Taxpayer Advocate 2006 Annual Report to Congress 141-156 (Most Serious Problem: *Collection Issues of Low Income Taxpayers*).

32 National Taxpayer Advocate 2001 Annual Report to Congress 128-165 (Legislative Recommendation: *Joint and Several Liability*).

33 National Taxpayer Advocate 2011 Annual Report to Congress 531-536 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinizations Under Internal Revenue Code Section 6015(f) is De Novo*).

34 National Taxpayer Advocate 2006 Annual Report to Congress 458-462 (Legislative Recommendation: *Repeal Private Debt Collection Provisions*).

exceed 250 percent of the applicable poverty level.[35] The provision in this bill would establish an income threshold for referral to PDC for taxpayers whose adjusted gross income does not exceed 200 percent of the applicable poverty level.

- **Taxpayer Advocate Directive.**[36] This provision would amend IRC § 7803(c) by adding a segment on the power of the National Taxpayer Advocate to issue TADs, and that the Commissioner of the Internal Revenue Service must modify, rescind, or ensure compliance with a TAD within 90 days of its issuance. The National Taxpayer Advocate may appeal a modification or rescission, to which the Commissioner must ensure compliance or provide the National Taxpayer Advocate with a detailed description of the reasons behind making the modification or rescission.
- **Matching Grants Program for Return Preparation.**[37] This provision would establish a VITA matching grant program.
- **Referrals to LITCs.**[38] This provision would allow officers and employees of the Department of Treasury to advise taxpayers of the availability of and the eligibility requirements for receiving assistance from LITCs. It would also allow such officers and employees to provide to taxpayers the addresses and contact information for these clinics.
- **Whistleblower.**[39] This provision amends IRC § 7623 to add civil action protections for whistleblowers against retaliation.
- **Single Point of Contact.**[40] This provision would require the Secretary of the Treasury to establish and implement procedures to create a single point of contact at the IRS for taxpayers whose tax return has been delayed or adversely affected by tax-related identity theft.
- **Notification of Suspected Identity Theft.**[41] This provision would require the Secretary to notify an individual as soon as practicable if there has been or may have been an unauthorized use of their identity, and it can be disclosed without jeopardizing an investigation relating to tax

35 Most Serious Problem: *Private Debt Collection: The IRS's Expanding Private Debt Collection Program Continues to Burden Taxpayers Who Are Likely Experiencing Economic Hardship While Inactive PCA Inventory Accumulates*, *supra*; National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Amend IRC § 6306(d) to Exclude the Debts of Taxpayers Whose Incomes are Less Than Their Allowable Living Expenses From Assignment to Private Collection Agencies or, if That Is Not Feasible, Exclude the Debts of Taxpayers Whose Incomes Are Less Than 250 Percent of the Federal Poverty Level*) (Dec. 2018); National Taxpayer Advocate 2017 Annual Report to Congress 10-21 (Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship*).

36 National Taxpayer Advocate 2016 Annual Report to Congress 39-40 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).

37 National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VTA/TCE Funding: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*); National Taxpayer Advocate 2002 Annual Report to Congress vii-viii.

38 National Taxpayer Advocate 2007 Annual Report to Congress 551-553 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

39 National Taxpayer Advocate 2015 Annual Report to Congress 409-412 (Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*).

40 National Taxpayer Advocate 2013 Annual Report to Congress 61 (Most Serious Problem: *Regulation of Return Preparers: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS is Enjoined From Continuing its Efforts to Effectively Regulate Unenrolled Preparers*).

41 National Taxpayer Advocate 2011 Annual Report to Congress 48-74 (Most Serious Problem: *Tax-Related Identity Theft Continues to Impose Significant Burdens on Taxpayers and the IRS*).

administration. Such notice must include instructions on further steps, including the necessary forms to complete and how to file a report with law enforcement.

- **Increase Preparer Penalties.**[42] This provision would increase penalties for improper disclosure or use of information by preparers of tax returns.
- **Scannable Returns.**[43] This provision would require that electronically prepared tax returns that are printed and filed on paper include scannable code, which can convert such a tax return to electronic format.
- **Require the IRS to Provide Annual Taxpayer Rights Training to Employees.**[44] This provision would require the Commissioner of Internal Revenue to provide Congress with a written report on a comprehensive training strategy, including a plan to develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate, for employees that interface with taxpayers and their managers.
- **Notification to Exempt Organizations.**[45] This provision would require the IRS to provide notice to tax exempt organizations before the revocation of their tax-exempt status for failure to file their tax return for two consecutive years. The notification shall include information about how to comply to avoid loss of tax-exempt status.

Protecting Taxpayers Act

On April 11, 2018, co-sponsors Senators Portman and Cardin introduced this legislation that would enact several of the National Taxpayer Advocate's proposals.[46]

- **Regulation of Income Tax Return Preparers.**[47] This provision would allow the Department of the Treasury to regulate the practice of tax return preparers and give it the authority to sanction regulated tax return preparers. This provision would also provide minimum competency standards for tax return preparers.
- **Permit the IRS to Release Levies on Small Business Taxpayers.**[48] This provision would allow for the release of federal tax levies which cause business hardship.

---

42 National Taxpayer Advocate 2003 Annual Report to Congress 270-301 (Legislative Recommendations: *Federal Tax Return Preparers: Oversight and Compliance*).

43 National Taxpayer Advocate 2013 Annual Report to Congress vol. 2 70, 91, 96 (Research Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).

44 National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Codify the Taxpayer Bill of Rights, a Taxpayer Rights Training Requirement, and the IRS Mission Statement As Section 1 of the Internal Revenue Code*) (Dec. 2018); National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 7 (*Require the IRS to Provide Annual Taxpayer Rights Training to Employees*) (Dec. 2017).

45 National Taxpayer Advocate 2011 Annual Report to Congress 444 (Most Serious Problem: *The IRS Makes Reinstatement on an Organization's Exempt Status Following Revocation Unnecessarily Burdensome*).

46 Protecting Taxpayers Act, S. 3278, 115th Cong. (2018).

47 National Taxpayer Advocate 2009 Annual Report to Congress 41-69 (Most Serious Problem: *The IRS Lacks a Servicewide Return Preparer Strategy*); National Taxpayer Advocate 2008 Annual Report to Congress 423-426 (Legislative Recommendation: *The Time Has Come to Regulate Federal Tax Return Preparers*); National Taxpayer Advocate 2007 Annual Report to Congress 140-155 (Most Serious Problem: *Preparer Penalties and Bypass of Taxpayers' Representatives*); National Taxpayer Advocate 2007 Annual Report to Congress 83-95 (Most Serious Problem: *The Use and Disclosure of Tax Return Information by Preparers to Facilitate the Marketing of Refund Anticipation Loans and Other Products with High Abuse Potential*); National Taxpayer Advocate 2003 Annual Report to Congress 270-301 (Legislative Recommendation: *Federal Tax Return Preparers: Oversight and Compliance*); National Taxpayer Advocate 2002 Annual Report to Congress 216-230 (Legislative Recommendation: *Regulation of Federal Tax Return Preparers*).

48 National Taxpayer Advocate 2011 Annual Report to Congress 537-543 (Legislative Recommendation: *Amend IRC § 6343(a) to Permit the IRS to Release Levies on Business Taxpayers that Impose Economic Hardship*).

- **Election to Be Treated as an S Corporation.**[49] This provision would give an extension of time for a small business corporation to elect to be treated as an S corporation. Small businesses could make the election no later than the due date for filing the tax return of the S corporation for the taxable year.
- **Repeal PDC Provisions.**[50] While the National Taxpayer Advocate's legislative recommendation has been to repeal PDC provisions, she has made additional recent recommendations to establish an income threshold for referral to PDC for taxpayers whose incomes are less than their allowable living expenses or if their adjusted gross income does not exceed 250 percent of the applicable poverty level.[51] The provision in this bill would establish an income threshold for referral to PDC for taxpayers whose adjusted gross income does not exceed 250 percent of the applicable poverty level.
- **Matching Grants Program for Return Preparation.**[52] This provision would establish a VITA matching grant program.
- **Referrals to LITCs.**[53] This provision would allow the Secretary to refer taxpayers to LITCs, and to promote the benefits and encourage the use of LITCs in mass communications and referrals. It would also allow the VITA grantee programs to advise taxpayers on the availability and eligibility requirements to use LITCs and to provide to taxpayers the addresses and contact information for these clinics.
- **Waiver of Installment Agreement Fees for Low Income Taxpayers.**[54] This provision would waive any fee otherwise required with the submission of an OIC for low income taxpayers. While this provision does not mention installment agreement fees as the title of this recommendation suggests, the past MSPs and LRs that discussed this recommendation extend the recommendation to the OIC and user fees that this provision waives.

---

49 National Taxpayer Advocate 2010 Annual Report to Congress 410-411 (Legislative Recommendation: *Extend the Due Date for S Corporation Elections to Reduce the High Rate of Untimely Elections*); National Taxpayer Advocate 2004 Annual Report to Congress 390-393 (Legislative Recommendation: *Election To Be Treated As An S Corporation*); National Taxpayer Advocate 2002 Annual Report to Congress 246 (Legislative Recommendation: *Election To Be Treated As An S Corporation*).

50 National Taxpayer Advocate 2006 Annual Report to Congress 458-462 (Legislative Recommendation: *Repeal Private Debt Collection Provisions*).

51 Most Serious Problem: *Private Debt Collection: The IRS's Expanding Private Debt Collection Program Continues to Burden Taxpayers Who Are Likely Experiencing Economic Hardship While Inactive PCA Inventory Accumulates*, *supra*; National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Amend IRC § 6306(d) to Exclude the Debts of Taxpayers Whose Incomes are Less Than Their Allowable Living Expenses From Assignment to Private Collection Agencies or, if That Is Not Feasible, Exclude the Debts of Taxpayers Whose Incomes Are Less Than 250 Percent of the Federal Poverty Level*) (Dec. 2018); National Taxpayer Advocate 2017 Annual Report to Congress 10-21 (Most Serious Problem: *Private Debt Collection: The IRS's Private Debt Collection Program Is Not Generating Net Revenues, Appears to Have Been Implemented Inconsistently with the Law, and Burdens Taxpayers Experiencing Economic Hardship*).

52 National Taxpayer Advocate 2014 Annual Report to Congress 55-66 (Most Serious Problem: *VTA/TCE Funding: Volunteer Tax Assistance Programs Are Too Restrictive and the Design Grant Structure Is Not Adequately Based on Specific Needs of Served Taxpayer Populations*); National Taxpayer Advocate 2002 Annual Report to Congress vii-viii.

53 National Taxpayer Advocate 2007 Annual Report to Congress 551-553 (Legislative Recommendation: *Referral to Low Income Taxpayer Clinics*).

54 National Taxpayer Advocate 2017 Annual Report to Congress 307-313 (Legislative Recommendation: *User Fees: Prohibit User Fees That Reduce Revenue, Increase Costs, or Erode Taxpayer Rights*); National Taxpayer Advocate 2015 Annual Report to Congress 14-35 (Most Serious Problem: *IRS User Fees: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance*); National Taxpayer Advocate 2007 Annual Report to Congress 66-82 (Most Serious Problem: *User Fees: Taxpayer Service For Sale*); National Taxpayer Advocate 2006 Annual Report to Congress 141-156 (Most Serious Problem: *Collection Issues of Low Income Taxpayers*).

- **Strengthen the Independence of the IRS Office of Appeals.**[55] This provision would give taxpayers the right to a conference with the IRS Office of Appeals that does not include personnel from the IRS Office of Chief Counsel or IRS compliance functions. Such personnel would not be allowed to participate in the conference without the specific consent of the taxpayer to include them.
- **Restrict Tax Return Disclosures to Necessary Content.**[56] This provision would limit the access of non-IRS employees to tax returns and tax return information.
- **Require the IRS to Provide Annual Taxpayer Rights Training to Employees.**[57] This provision would require the Commissioner of the IRS to provide Congress with a written report on a comprehensive training strategy for employees, including a plan to develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate.

21st Century IRS Act

On April 10, 2018, Representative Bishop and six other Representatives introduced this legislation that would enact two of the National Taxpayer Advocate's recommendations.[58]

- **Restrict Tax Return Disclosures to Necessary Content.**[59] This provision would limit redisclosures and uses of consent-based disclosures of tax return information.
- **Increase Preparer Penalties.**[60] This provision would require the Secretary to publish guidance to establish uniform standards and procedures for accepting electronic signatures with respect to any request for disclosure of a taxpayer's tax return or tax return information to any practitioner or power of attorney. This relates to our recommendation to strengthen oversight of all preparers by enhancing due diligence and signature requirements.

55 National Taxpayer Advocate 2009 Annual Report to Congress 346-350 (Legislative Recommendation: *Strengthen the Independence of the IRS Office of Appeals and Require at Least One Appeals Officer and Settlement Officer in Each State*).

56 National Taxpayer Advocate 2007 Annual Report to Congress 554-555 (Legislative Recommendation: *Consent-Based Disclosures of Tax Return Information Under Internal Revenue Code Section 6103(c)*).

57 National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (*Codify the Taxpayer Bill of Rights, a Taxpayer Rights Training Requirement, and the IRS Mission Statement As Section 1 of the Internal Revenue Code*) (Dec. 2018); National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 7 (Require the IRS to Provide Annual Taxpayer Rights Training to Employees*) (Dec. 2017).

58 21st Century IRS Act, H.R. 5445, 115th Cong. (2018).

59 National Taxpayer Advocate 2007 Annual Report to Congress 554-555 (Legislative Recommendation: *Consent-Based Disclosures of Tax Return Information Under Internal Revenue Code Section 6103(c)*).

60 National Taxpayer Advocate 2003 Annual Report to Congress 270-301 (Legislative Recommendation: *Federal Tax Return Preparers: Oversight and Compliance*).

Military Taxpayer Assistance Act

In her 2017 Annual Report, the National Taxpayer Advocate discussed problems with the customer service the IRS provided to the military and made both administrative and legislative recommendations to improve it.[61] On April 11, 2018, Representatives Walz and Kind introduced legislation that would enact four of the National Taxpayer Advocate's proposals.[62]

- Provide a year-round dedicated toll-free telephone line for members of the Uniformed Services and their families to answer tax law and filing questions, and to resolve their tax account and compliance issues.
- Create a special unit of Stakeholder Partnerships, Education & Communication (SPEC) staffed, to the extent possible, with veterans whose responsibilities are to develop and conduct outreach, education, and assistance to current military taxpayers, including National Guard and Reservists, and to those organizations that provide tax assistance to these taxpayers.
- Support the authorization of the VITA program and support ample funding for SPEC to provide face-to-face training for military VITA volunteers in overseas locations.
- Assign a dedicated IRS employee to routinely update the military information on the irs.gov website.

In addition to the legislation discussed above, there were a handful of smaller bills introduced during the second session of the 115th Congress relating to the National Taxpayer Advocate's past recommendations that are not highlighted here but are recorded in the table following this introduction.

61 National Taxpayer Advocate 2017 Annual Report to Congress 151-164 (Most Serious Problem: *Military Assistance: The IRS's Customer Service and Information Provided to Military Taxpayers Falls Short of Meeting Their Needs and Preferences*).

62 Military Taxpayer Assistance Act, H.R. 5479, 115th Cong. (2018).

National Taxpayer Advocate Legislative Recommendations With Congressional Action

Alternative Minimum Tax (AMT)				
Repeal the Individual AMT National Taxpayer Advocate 2001 Annual Report to Congress 82–100; National Taxpayer Advocate 2004 Annual Report to Congress 383–385; National Taxpayer Advocate 2008 Annual Report to Congress 356–362.	Repeal the AMT outright.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Passed House, Placed on Senate Calendar 11/28/2017
Legislative Activity 113th Congress	S 1616	Lee	10/30/2013	Referred to the Finance Committee
	HR 243	Ross	1/14/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 86	Bachmann	1/5/2011	Referred to the Ways & Means Committee
	HR 99	Dreler	1/5/2011	Referred to the Ways & Means Committee
	HR 547	Garrett	2/8/2011	Referred to the Ways & Means Committee
	HR 3400	Garrett	11/10/2011	Referred to the Ways & Means Committee
	S 727	Wyden	4/5/2011	Referred to the Finance Committee
	S 820	Shelby	4/14/2011	Referred to the Finance Committee
	HR 3804	Huelskamp	1/23/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3018	Wyden	2/23/2010	Referred to the Finance Committee
	HR 240	Garrett	1/7/2009	Referred to the Ways & Means Committee
	HR 782	Paul	1/28/2009	Referred to the Ways & Means Committee
	S 932	Shelby	4/30/2009	Referred to the Finance Committee
Legislative Activity 110th Congress	S 55	Baucus	1/4/2007	Referred to the Finance Committee
	S 14	Kyl	4/17/2007	Referred to the Finance Committee
	S 1040	Shelby	3/29/2007	Referred to the Finance Committee
	HR 1366	English	3/7/2007	Referred to the Ways & Means Committee
	HR 1942	Garrett	4/19/2007	Referred to the Ways & Means Committee
	HR 3970	Rangel	10/25/2007	Referred to the Ways & Means Committee
	S 2293	Lott	11/1/2007	Placed on the Senate Legislative Calendar under General Orders. Calendar No. 464
Legislative Activity 109th Congress	HR 1186	English	3/9/2005	Referred to the Ways & Means Committee
	S 1103	Baucus	5/23/2005	Referred to the Finance Committee
	HR 2950	Neal	6/16/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 43	Collins	1/7/2003	Referred to the Ways & Means Committee
	HR 1233	English	3/12/2003	Referred to the Ways & Means Committee
	S 1040	Shelby	5/12/2003	Referred to the Finance Committee
	HR 3060	N. Smith	9/10/2003	Referred to the Ways & Means Committee
	HR 4131	Houghton	4/2/2004	Referred to the Ways & Means Committee
	HR 4164	Shuster	4/2/2004	Referred to the Ways & Means Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 107th Congress	HR 437	English	2/6/2001	Referred to the Ways & Means Committee
	S 616	Hutchison	3/26/2002	Referred to the Finance Committee
	HR 5166	Portman	7/18/2002	Referred to the Ways & Means Committee
Index Alternative Minimum Tax (AMT) for Inflation National Taxpayer Advocate 2001 Annual Report to Congress 82–100.	If full repeal of the individual AMT is not possible, it should be indexed for inflation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3223	McConnell	9/13/2010	Placed on the Senate Calendar
	HR 5077	Hall	4/20/2010	Referred to the Ways & Means Committee
	HR 719	Lee	1/27/2009	Referred to the Ways & Means Committee
	S 722	Baucus	3/26/2009	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 1942	Garrett	4/19/2007	Referred to the Ways & Means Committee
Legislative Activity 109th Congress	HR 703	Garrett	2/9/2005	Referred to the Ways & Means Committee
	HR 4096	Reynolds	10/20/2005	12/7/2005 Passed the House; 12/13/2005 Placed on the Senate Legislative Calendar
Legislative Activity 108th Congress	HR 22	Houghton	1/7/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 5505	Houghton	10/1/2002	Referred to the Ways & Means Committee
Eliminate Several Adjustments for Individual AMT National Taxpayer Advocate 2001 Annual Report to Congress 82–100.	Eliminate personal exemptions, the standard deduction, deductible state and local taxes, and miscellaneous itemized deductions as adjustment items for individual AMT purposes.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 336	DeMint	2/14/2011	Referred to the Finance Committee
Legislative Activity 110th Congress	S 102	Kerry	1/4/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 1861	Harkin	10/7/2005	Referred to the Finance Committee
Legislative Activity 108th Congress	HR 1939	Neal	5/12/2003	Referred to the Ways & Means Committee
Private Debt Collection (PDC)				
Repeal PDC Provisions National Taxpayer Advocate 2006 Annual Report to Congress 458–462.	Repeal IRC § 6306, thereby terminating the PDC initiative.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 2425	Cardin	2/14/2018	Referred to the Finance Committee
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	HR 796	Lewis	2/3/2009	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	S 335	Dorgan	1/18/2007	Referred to the Finance Committee
	HR 695	Van Hollen	1/24/2007	Referred to the Ways & Means Committee
	HR 3056	Rangel	7/17/2007	10/10/2007 Passed the House; 10/15/2007 Referred to the Finance Committee

Establish Income Theshold National Taxpayer Advocate 2016 Annual Report to Congress 172-186. National Taxpayer Advocate 2017 Annual Report to Congress 21.	Exclude the debts of taxpayers whose incomes are less than their allowable living expenses from assignment to private collection agencies or, if that is not feasible, exclude the debts of taxpayers whose incomes are less than 250 percent of the federal poverty level).			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3278	Portman/ Cardin	7/26/2018	Referred to Finance Committee

Tax Preparation and Low Income Taxpayer Clinics (LITC)

Matching Grants Program for Return Preparation National Taxpayer Advocate 2002 Annual Report to Congress vii–viii.	Create a grant program for return preparation similar to the LITC grant program. The program should be designed to avoid competition with VITA and should support the IRS's goal (and need) to have returns electronically filed.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3278	Portman/ Cardin	7/26/2018	Referred to Finance Committee
	S 3246	Hatch	7/19/2018	Referred to Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	HR 2901	Curbelo	6/15/2017	Referred to the Ways & Means Committee
	S 797	Brown	3/30/2017	Referred to Finance Committee
	HR 605	Davis	1/23/2017	Referred to the Ways & Means Committee
	S 193	Brown	1/23/2017	Referred to Finance Committee
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division E (2015).			
	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4835	Honda	3/22/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	Pub. L. No. 113-235, Division E, 128 Stat. 2130, 2336 (2014).			
Legislative Activity 111th Congress	Pub. L. No. 111-117, Div. C, Title I, 123 Stat. 3034, 3163 (2009).			
Legislative Activity 110th Congress	Pub. L. No. 110-161, Div. D, Title I, 121 Stat. 1975, 1976 (2007).			
	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
	S 1967	Clinton	8/2/2007	Referred to the Finance Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with S. Rep. No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders. Calendar No. 614
Legislative Activity 108th Congress	S 476	Grassley	2/27/2003	Referred to the Finance Committee
	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
	HR 3991	Houghton	3/19/2001	Referred to the Ways & Means Committee
	HR 7	Baucus	7/16/2002	Reported by Chairman Baucus with an amendment; referred to the Finance Committee
Referrals to LITCs National Taxpayer Advocate 2007 Annual Report to Congress 551–553.	Amend IRC § 7526(c) to add a special rule stating that notwithstanding any other provision of law, IRS employees may refer taxpayers to LITCs receiving funding under this section. This change will allow IRS employees to refer a taxpayer to a specific clinic for assistance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	HR 5438	Holding	4/19/2018	Passed the House
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 1573	Durbin	9/15/2011	Placed on the Senate Legislative Calendar under General Orders; Calendar No. 171
	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee

Regulation of Income Tax Return Preparers	
National Taxpayer Advocate 2002 Annual Report to Congress 216–230; National Taxpayer Advocate 2003 Annual Report to Congress 270–301; National Taxpayer Advocate 2007 Annual Report to Congress 83–95 & 140–155; National Taxpayer Advocate 2008 Annual Report to Congress 423–426; National Taxpayer Advocate 2009 Annual Report to Congress 41–69; National Taxpayer Advocate 2009 Annual Report to Congress 60-74.	Create an effective oversight and penalty regime for return preparers by taking the following steps: ◆ Enact a registration, examination, certification, and enforcement program for federal tax return preparers; ◆ Direct the Secretary of the Treasury to establish a joint task force to obtain accurate data about the composition of the return preparer community and make recommendations about the most effective means to ensure accurate and professional return preparation and oversight; ◆ Require the Secretary of the Treasury to study the impact cross-marketing tax preparation services with other consumer products and services has on the accuracy of returns and tax compliance; and ◆ Require the IRS to take steps within its existing administrative authority, including requiring a checkbox on all returns in which preparers would enter their category of return preparer (*i.e.*, attorney, CPA, enrolled agent, or unenrolled preparer) and developing a simple, easy-to-read pamphlet for taxpayers that explains their protections.

	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 1996	Bonamici	4/6/2017	Referred to House Financial Services
	S 606	Nelson	3/9/2017	Referred to the Finance Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee

Identity Theft				
Single Point of Contact National Taxpayer Advocate 2013 Annual Report to Congress 61.	Designate a single point of contact for identity theft victims to work with the identity theft victim until all related issues are resolved.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3246	Hatch	7/19/2018	Referred to Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	HR 5439	Renacci	4/9/2018	Passed the House on 4/17/2018; 4/18/2018 Pursuant to the provisions in H. Res. 831, H.R. 5439 is laid on the table
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 439	Renacci	1/11/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	S 3157	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 3156	Hatch	7/12/2016	Referred to Finance Committee
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
	S 767	Nelson	3/9/2015	Referred to Finance Committee
Legislative Activity 113th Congress	S 2736	Hatch	7/31/2014	Referred to Finance Committee
Notification of Suspected Identity Theft National Taxpayer Advocate 2011 Annual Report to Congress 75-83.	Require the IRS to notify taxpayers of suspected identity theft, including employment-related identity theft.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3246	Hatch	7/19/2018	Referred to Finance Committee
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	HR 439	Renacci	1/11/2017	Referred to the Ways & Means Committee
	S 606	Nelson	3/9/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3157	Hatch	7/12/2016	Referred to Finance Committee
	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Public Awareness Campaign for Low Income Taxpayer Clinics National Taxpayer Advocate 2014 Annual Report to Congress 411–416; National Taxpayer Advocate 2014 Annual Report to Congress, vol. 2 1–26; National Taxpayer Advocate 2007 Annual Report to Congress 551–553.	Authorize the Secretary to promote the benefits of and encourage the use of qualified LITCs through the use of mass communications, referrals, and other means.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5438	Holding	4/9/2018	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee

Public Awareness Campaign on Registration Requirements National Taxpayer Advocate 2002 Annual Report to Congress 216–230.	Authorize the IRS to conduct a public information and consumer education campaign, utilizing paid advertising, to inform the public of the requirements that paid preparers must sign the return prepared for a fee and display registration cards.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with S. Rep. No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Increase Preparer Penalties National Taxpayer Advocate 2003 Annual Report to Congress 270–301.	Strengthen oversight of all preparers by enhancing due diligence and signature requirements, increasing the dollar amount of preparer penalties, and assessing and collecting those penalties, as appropriate.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
	HR 5445	Bishop	4/10/2018	Passed in the House
	HR 7227	Jenkins	12/17/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
Legislative Activity 112th Congress	Pub. L. No. 112-41 § 501, 125 Stat. 428, 459 (2011).			
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 4318	Crowley/ Ramstad	12/6/2007	Referred to the Ways & Means Committee
	S 2851	Bunning	4/14/2008	Referred to the Finance Committee
	S 1219	Bingaman	4/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 894	Becerra	2/17/2005	Referred to the Financial Institutions and Consumer Credit Subcommittee
	S 832	Bingaman	4/18/2005	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on Senate Legislative Calendar under General Orders; Calendar No. 614

	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	S 685	Bingaman	3/21/2003	Referred to the Finance Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated into HR 1528 as an amendment and HR 1528 passed in lieu of S 882
	HR 3983	Becerra	3/17/2004	Referred to the Ways & Means Committee
Refund Delivery Options National Taxpayer Advocate 2008 Annual Report to Congress 427–441.	Direct the Department of the Treasury and the IRS to (1) minimize refund turnaround times; (2) implement a Revenue Protection Indicator; (3) develop a program to enable unbanked taxpayers to receive refunds on stored value cards (SVCs); and (4) conduct a public awareness campaign to disseminate accurate information about refund delivery options.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
Small Business Issues				
Health Insurance Deduction/Self-Employed Individuals National Taxpayer Advocate 2001 Annual Report to Congress 223; National Taxpayer Advocate 2008 Annual Report to Congress 388–389.	Allow self-employed taxpayers to deduct the costs of health insurance premiums for purposes of self-employment taxes.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	Pub. L. No. 111-240, § 2504 Stat 2560 (2010).			
	S 725	Bingaman	3/26/2009	Referred to the Finance Committee
	HR 1470	Kind	3/12/2009	Referred to the Ways & Means Committee
Legislative Activity 110th Congress	S 2239	Bingaman	10/25/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 663	Bingaman	3/17/2005	Referred to the Finance Committee
	S 3857	Smith	9/16/2006	Referred to the Finance Committee
Legislative Activity 108th Congress	HR 741	Sanchez	2/12/2003	Referred to the Ways & Means Committee
	HR 1873	Manzullo Velazquez	4/30/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	S 2130	Bingaman	4/15/2002	Referred to the Finance Committee
Married Couples as Business Co-owners National Taxpayer Advocate 2002 Annual Report to Congress 172–184.	Amend IRC § 761(a) to allow a married couple operating a business as co-owners to elect out of subchapter K of the IRC and file one Schedule C (or Schedule F in the case of a farming business) and two Schedules SE if certain conditions apply.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	Pub.L. No. 110-28, Title VIII, § 8215, 121 Stat. 193, 194 (2007).			
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in Senate, with an amendment
	S 842	Kerry	4/9/2003	Referred to the Finance Committee
	HR 1640	Udall	4/3/2003	Referred to the Ways & Means Committee
	HR 1558	Doggett	4/2/2003	Referred to the Ways & Means Committee

Income Averaging for Commercial Fishermen National Taxpayer Advocate 2001 Annual Report to Congress 226.	Amend IRC § 1301(a) to provide commercial fishermen the benefit of income averaging currently available to farmers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	Pub. L. No. 108-357, § 314, 118 Stat. 1468, 1469 (2004).			
Election to Be Treated As an S Corporation National Taxpayer Advocate 2004 Annual Report to Congress 390–393.	Amend IRC § 1362(a) to allow a small business corporation to elect to be treated as an S corporation no later than the date it timely files (including extensions) its first Form 1120S, *U.S. Income Tax Return for an S Corporation.*			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
Legislative Activity 112th Congress	S 2271	Franken	3/29/2012	Referred to the Finance Committee
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
Regulation of Payroll Tax Deposits Agents National Taxpayer Advocate 2004 Annual Report to Congress 394–399.	◆ Amend the IRC to require any person who enters into an agreement with an employer to collect, report, and pay any employment taxes to furnish a performance bond that specifically guarantees payment of federal payroll taxes collected, deducted, or withheld by such person from an employer and from wages or compensation paid to employees; ◆ Amend IRC § 3504 to require agents with an approved Form 2678, *Employer/Payer Appointment of Agent*, to allocate reported and paid employment taxes among their clients using a form prescribed by the IRS and impose a penalty for the failure to file absent reasonable cause; and ◆ Amend the U.S. Bankruptcy Code to clarify that IRC § 6672 penalties survive bankruptcy in the case of non-individual debtors.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division E, § 106 (2015).			
Legislative Activity 113th Congress	S 900	Mikulski	05/08/2013	Referred to the Finance Committee
Legislative Activity 110th Congress	S 1773	Snowe	7/12/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 3583	Snowe	6/27/2006	Referred to the Finance Committee
	S 1321	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Issue Dual Address Change Notice National Taxpayer Advocate 2004 Annual Report to Congress 394–399.	Issue dual address change notices related to an employer making employment tax payments (with one notice sent to both the employer's former and new address).			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division E, § 106 (2015).			
Legislative Activity 113th Congress	Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5, 190 (2014) and Pub. L. No. 113-235, Division E, Title I, § 106, 128 Stat. 2130, 2338 (2014).			

Special Consideration for Offer in Compromise National Taxpayer Advocate 2004 Annual Report to Congress 394–399.	Give special consideration to an offer in compromise (OIC) request from a victim of fraud or bankruptcy by a third-party payroll tax preparer.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 113th Congress	Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5, 190 (2014) and Pub. L. No. 113-235, Division E, Title I, § 106, 128 Stat. 2130, 2338 (2014).			
Simplification				
Reduce the Number of Tax Preferences National Taxpayer Advocate 2010 Annual Report to Congress 365–372.	Simplify the complexity of the tax code generally by reducing the number of tax preferences.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee
Simplify and Streamline Education Tax Incentives National Taxpayer Advocate 2008 Annual Report to Congress 370–372; National Taxpayer Advocate 2004 Annual Report to Congress 403–422.	Enact reforms to simplify and streamline the education tax incentives by consolidating, creating uniformity among, or adding permanency to the various education tax incentives. Specifically, (1) incentives under § 25A should be consolidated with § 222 and possibly § 221; (2) the education provisions should be made more consistent regarding the relationship of the student to the taxpayer; (3) the definitions for "Qualified Higher Education Expenses" and "Eligible Education Institution" should be simplified; (4) the income level and phase-out calculations should be more consistent under the various provisions; (5) all dollar amounts should be indexed for inflation; and (6) after initial use of sunset provisions and simplification amendments, the incentives should be made permanent.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 823	Doggett	2/2/2017	Referred to the Ways & Means Committee
	HR 1	Brady	11/2/2017	Passed House, placed on Senate Calendar 11/28/2017
Legislative Activity 114th Congress	S 699	Schumer	3/10/2015	Referred to the Finance Committee
	HR 1260	Doggett	3/4/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 835	Schumer	4/25/2013	Referred to the Finance Committee
	HR 1738	Doggett	4/25/2013	Referred to the Ways & Means Committee
	HR 3476	Israel	11/13/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee
	S 3267	Schumer	6/6/2012	Referred to the Finance Committee
	HR 6522	Israel	9/21/2012	Referred to the Ways & Means Committee
Simplify and Streamline Retirement Savings Tax Incentives National Taxpayer Advocate 2008 Annual Report to Congress 373–374; National Taxpayer Advocate 2004 Annual Report to Congress 423–432.	Consolidate existing retirement incentives, particularly where the differences in plan attributes are minor. For instance, Congress should consider establishing one retirement plan for individual taxpayers, one for plans offered by small businesses, and one suitable for large businesses and governmental entities (eliminating plans that are limited to governmental entities). At a minimum, Congress should establish uniform rules regarding hardship withdrawals, plan loans, and portability.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 727	Wyden	4/5/2011	Referred to the Finance Committee

Children Income National Taxpayer Advcate 2002 Annual Report to Congress 231-234	Repeal the rules under Internal Revenue Code section 1(g) that govern the taxation of investment income of children under age 14 and thereby sever the link between the computation of the child's tax liability and the parent's tax return.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Pub. L. No. 115-97, § 11001 (2017)
Tax Gap Provisions				
Corporate Information Reporting National Taxpayer Advocate 2008 Annual Report to Congress 388.	Require businesses that pay $600 or more during the year to non-corporate and corporate service providers to file an information report with each provider and with the IRS. Information reporting already is required on payments for services to non-corporate providers. This applies to payments made after December 31, 2011.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 1796	Baucus	10/19/2009	10/19/2009 Placed on Senate Legislative Calendar under General Orders; Calendar No. 184
Reporting on Customer's Basis in Security Transaction National Taxpayer Advocate 2005 Annual Report to Congress 433–441.	Require brokers to keep track of an investor's basis, transfer basis information to a successor broker if the investor transfers the stock or mutual fund holding, and report basis information to the taxpayer and the IRS (along with the proceeds generated by a sale) on Form 1099-B.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	Pub. L. No. 110-343, § 403, 121 Stat. 3854, 3855 (2008).			
	HR 878	Emanuel	2/7/2007	Referred to the Ways & Means Committee
	S 601	Bayh	2/14/2007	Referred to the Finance Committee
	S 1111	Wyden	4/16/2007	Referred to the Finance Committee
	HR 2147	Emanuel	5/3/2007	Referred to the Ways & Means Committee
	HR 3996 PCS	Rangel	10/30/2007	11/14/2007 Placed on the Senate Calendar; became Pub. L. No. 110-166 (2007) without this provision
Legislative Activity 109th Congress	S 2414	Bayh	3/14/2006	Referred to the Finance Committee
	HR 5176	Emanual	4/25/2006	Referred to the Ways & Means Committee
	HR 5367	Emanual	5/11/2006	Referred to the Ways & Means Committee
IRS Forms Revisions National Taxpayer Advocate 2004 Annual Report to Congress 480; National Taxpayer Advocate 2010 Annual Report to Congress 40.	Revise Form 1040, Schedule C, to include a line item showing the amount of self-employment income that was reported on Forms 1099-MISC.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee

<table>
<tr><td>IRS to Promote Estimated Tax Payments Through the Electronic Federal Tax Payment System (EFTPS)
National Taxpayer Advocate 2005 Annual Report to Congress 381–396.</td><td colspan="4">Amend IRC § 6302(h) to require the IRS to promote estimated tax payments through EFTPS and establish a goal of collecting at least 75 percent of all estimated tax payment dollars through EFTPS by FY 2012.</td></tr>
<tr><td></td><td>Bill Number</td><td>Sponsor</td><td>Date</td><td>Status</td></tr>
<tr><td>Legislative Activity 109th Congress</td><td>S 1321RS</td><td>Santorum</td><td>6/28/2005</td><td>9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336
9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614</td></tr>
<tr><td>Study of Use of Voluntary Withholding Agreements
National Taxpayer Advocate 2004 Annual Report to Congress 478–489;
National Taxpayer Advocate 2005 Annual Report to Congress 381–396.</td><td colspan="4">Amend IRC § 3402(p)(3) to specifically authorize voluntary withholdings agreements between independent contractors and service-recipients as defined in IRC § 6041A(a)(1).</td></tr>
<tr><td></td><td>Bill Number</td><td>Sponsor</td><td>Date</td><td>Status</td></tr>
<tr><td>Legislative Activity 109th Congress</td><td>S 1321RS</td><td>Santorum</td><td>6/28/2005</td><td>9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336.
9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614</td></tr>
<tr><td>Require Form 1099 Reporting for Incorporated Service Providers
National Taxpayer Advocate 2007 Annual Report to Congress 494–496.</td><td colspan="4">Require service recipients to issue Forms 1099-MISC to incorporated service providers and increase the penalties for failure to comply with the information reporting requirements.</td></tr>
<tr><td></td><td>Bill Number</td><td>Sponsor</td><td>Date</td><td>Status</td></tr>
<tr><td>Legislative Activity 111th Congress</td><td colspan="4">Pub. L No. 111-148 § 9006 (2010).
However, this Act also contains a reporting requirement for goods sold, which the National Taxpayer Advocate opposes because of the enormous burden it places on businesses. See Legislative Recommendation: Repeal the Information Reporting Requirement for Purchases of Goods over $600, but Require Reporting on Corporate and Certain Other Payments.</td></tr>
<tr><td>Require Financial Institutions to Report All Accounts to the IRS by Eliminating the $10 Threshold on Interest Reporting
National Taxpayer Advocate 2007 Annual Report to Congress 501–502.</td><td colspan="4">Eliminate the $10 interest threshold beneath which financial institutions are not required to file Form 1099-INT reports with the IRS.</td></tr>
<tr><td></td><td>Bill Number</td><td>Sponsor</td><td>Date</td><td>Status</td></tr>
<tr><td>Legislative Activity 112th Congress</td><td>S 1289</td><td>Carper</td><td>6/28/2011</td><td>Referred to the Finance Committee</td></tr>
<tr><td>Legislative Activity 111th Congress</td><td>S 3795</td><td>Carper</td><td>9/16/2010</td><td>Referred to the Finance Committee</td></tr>
</table>

Revise Form 1040, Schedule C to Break Out Gross Receipts Reported on Payee Statements Such as Form 1099 National Taxpayer Advocate 2007 Annual Report to Congress 40.	Administrative recommendation that the IRS add a line to Schedule C, so that taxpayers would separately report the amount of income reported to them on Forms 1099 and other income not reported on Forms 1099. If enacted by statute, the IRS would be required to implement this recommendation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Include a Checkbox on Business Returns Requiring Taxpayers to Verify That They Filed All Required Forms 1099 National Taxpayer Advocate 2007 Annual Report to Congress 40.	Administrative recommendation that the IRS require all businesses to answer two questions on their income tax returns: "Did you make any payments over $600 in the aggregate during the year to any unincorporated trade or business?" and "If yes, did you file all required Forms 1099?" S 3795 would require the IRS to study whether placing a checkbox or similar indicator on business tax returns would affect voluntary compliance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Authorize Voluntary Withholding Upon Request National Taxpayer Advocate 2007 Annual Report to Congress 493–494.	Authorize voluntary withholding agreements between independent contractors and service recipients.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Require Backup Withholding on Certain Payments When TINs Cannot Be Validated National Taxpayer Advocate 2005 Annual Report to Congress 238–248.	Administrative recommendation that the IRS require payors to commence backup withholding if they do not receive verification of a payee's TIN. (S 3795 would require voluntary withholding on certain payments.)			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Worker Classification National Taxpayer Advocate 2008 Annual Report to Congress 375–390.	Direct Treasury and the Joint Committee on Taxation to report on the operation of the revised worker classification rules and provide recommendations to increase compliance.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee

Taxpayer Bill of Rights and *De Minimis* "Apology" Payments				
Taxpayer Bill of Rights National Taxpayer Advocate 2014 Annual Report to Congress; National Taxpayer Advocate 2013 Annual Report to Congress; National Taxpayer Advocate 2011 Annual Report to Congress 493–518; National Taxpayer Advocate 2007 Annual Report to Congress 478–448.	Enact a Taxpayer Bill of Rights setting forth the fundamental rights and obligations of U.S. taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 401 (2015).			
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 943	Portman	4/15/2015	Referred to the Finance Committee
	S 951	Ayotte	4/15/2015	Referred to the Finance Committee
	HR 1058	Roskam	2/25/2015	Passed the House of Representatives, and was referred to the Finance Committee on 4/16/2015
Legislative Activity 113th Congress	HR 2768	Roskam	6/22/2013	Passed the House of Representatives, and was referred to the Finance Committee on 8/31/2013
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Ways & Means Committee
	HR 5047	Becerra	4/15/2010	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 5716	Becerra	4/8/2008	Referred to the Ways & Means Committee
***De Minimis* "Apology" Payments** National Taxpayer Advocate 2007 Annual Report to Congress 490.	Grant the National Taxpayer Advocate the discretionary, nondelegable authority to provide *de minimis* compensation to taxpayers where the action or inaction of the IRS has caused excessive expense or undue burden to the taxpayer and the taxpayer meets the IRC § 7811 definition of significant hardship.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 111th Congress	S 3795	Carper	9/16/2010	Referred to the Finance Committee
Toll the Time Period for Financially Disabled Taxpayers to Request Return of Levy Proceeds to Better Protect Their Right to a Fair and Just Tax System National Taxpayer Advocate 2015 Annual Report to Congress 368–375	Requiring tolling for claims of financially disabled taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee

Simplify the Tax Treatment of Cancellation of Debt Income National Taxpayer Advocate 2008 Annual Report to Congress 391–396.	Enact one of several proposed alternatives to remove taxpayers with modest amounts of debt cancellation from the cancellation of debt income regime.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee, and the Financial Services Committee
Legislative Activity 111th Congress	HR 4561	Lewis	2/2/2010	Referred to the Ways & Means Committee
Joint and Several Liability				
Tax Court Review of Request for Equitable Innocent Spouse Relief National Taxpayer Advocate 2001 Annual Report to Congress 128–165.	Amend IRC § 6015(e) to clarify that taxpayers have the right to petition the Tax Court to challenge determinations in cases seeking relief under IRC § 6015(f) alone.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5444	Jenkins	4/10/2018	Passed in the House, Received in the Senate 4/19/2018 and referred to the Finance Committee
	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
Legislative Activity 109th Congress	Pub. L. No. 109-432, § 408, 120 Stat. 3061, 3062 (2006).			
Effect of Automatic Stay Imposed in Bankruptcy Cases Upon Innocent Spouse and CDP Petitions in Tax Court National Taxpayer Advocate 2004 Annual Report to Congress 490–492.	Allow a taxpayer seeking review of an innocent spouse claim or a collection case in U.S. Tax Court a 60-day suspension of the period for filing a petition for review, when the U.S. Bankruptcy Court has issued an automatic stay in a bankruptcy case involving the taxpayer's claim.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 725	Cornyn	4/15/2013	Referred to the Finance Committee
	HR 3479	Thornberry	11/13/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Ways & Means Committee
Clarify That the Scope and Standard of Tax Court Determinations Under IRC § 6015(f) Is *De Novo*. National Taxpayer Advocate 2011 Annual Report to Congress 531–536.	Amend IRC § 6015 to specify that the scope and standard of review in Tax Court determinations under IRC § 6015(f) is *de novo*.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee, and the Financial Services Committee

	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 725	Cornyn	4/15/2013	Referred to the Finance Committee
	HR 3479	Thornberry	11/13/2013	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 60550	Becerra	6/28/2012	Referred to the Ways & Means Committee
Collection Issues				
Improve Offer In Compromise Program Accessibility National Taxpayer Advocate 2006 Annual Report to Congress 507–519.	Repeal the partial payment requirement, or if repeal is not possible, (1) provide taxpayers with the right to appeal to the IRS Appeals function the IRS's decision to return an offer without considering it on the merits; (2) reduce the partial payment to 20 percent of current income and liquid assets that could be disposed of immediately without significant cost; and (3) create an economic hardship exception to the requirement.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	S 2689	Cornyn	4/17/2018	Referred to the Finance Committee
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 111th Congress	HR 4994	Lewis	4/13/2010	Referred to the Ways & Means Committee
	HR 2342	Lewis	5/12/2009	Referred to the Ways & Means Committee
Strengthen Taxpayer Protections in the Filing and Reporting of Federal Tax Liens National Taxpayer Advocate 2009 Annual Report to Congress 357–364.	Provide clear and specific guidance about the factors the IRS must consider when filing a Notice of Federal Tax Lien (NFTL) and amend the Fair Credit Reporting Act to set specific timeframes for reporting derogatory tax lien information on credit reports.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee
	HR 6439	Hastings	11/18/2010	Referred to the Ways & Means Committee

Permit the IRS to Release Levies on Small Business Taxpayers National Taxpayer Advocate 2011 Annual Report to Congress 537-543.	Amend IRC § 6343(a)(1)(d) to: permit the IRS, in its discretion, to release a levy against the taxpayer's property or rights to property if the IRS determines that the satisfaction of the levy is creating an economic hardship due to the financial condition of the taxpayer's business.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3278	Portman/ Cardin	7/26/2018	Referred to Finance Committee
	S 2689	Cornyn	4/17/2018	Referred to Finance Committee
Legislative Activity 112th Congress	HR 4368	McDermott	4/17/2012	Referred to the Ways & Means Committee

Return of Levy or Sale Proceeds National Taxpayer Advocate 2001 Annual Report to Congress 202–214.	Amend IRC § 6343(b) to extend the period of time within which a third party can request a return of levied funds or the proceeds from the sale of levied property from nine months to two years from the date of levy. This amendment would also extend the period of time available to taxpayers under IRC § 6343(d) within which to request a return of levied funds or sale proceeds.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1	Brady	11/2/2017	Pub. L. No. 115-97, § 11001 (2017)
	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 1677	Rangel	3/26/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 1321 RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 3991	Houghton	3/19/2002	Defeated in House
	HR 586	Lewis	2/13/2001	4/18/02 Passed the House with an amendment; referred to the Senate

Reinstatement of Retirement Accounts National Taxpayer Advocate 2001 Annual Report to Congress 202–214; National Taxpayer Advocate 2017 Annual Report to Congress Purple Book 41–42; National Taxpayer Advocate 2015 Annual Report to Congress 340—345; National Taxpayer Advocate 2015 Annual Report to Congress 100–111.	Amend the following IRC sections to allow contributions to individual retirement accounts and other qualified plans from the funds returned to the taxpayer or to third parties under IRC § 6343: ◆ § 401 – Qualified Pension, Profit Sharing, Keogh, and Stock Bonus Plans ◆ § 408 – Individual Retirement Account, and SEP-Individual Retirement Account ◆ § 408A – Roth Individual Retirement Account			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 1892	Larson	4/4/2017	Pub. L. 115-123
Legislative Activity 114th Congress	S 1578	Grassley	6/16/2015	Finance Committee
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
	HR 1677	Rangel	3/26/2007	Referred to the Finance Committee
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee. Reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated in HR 1528 through an amendment and HR 1528 passed in lieu of S 882
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to Senate
	HR 3991	Houghton	3/19/2002	Defeated in the House
Levies on Retirement Accounts National Taxpayer Advocate 2015 Annual Report to Congress 340–345.	Require the IRS to issue regulations describing a full financial analysis of the taxpayer's projected basic living expenses at retirement prior to allowing a determination to levy on a retirement account.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Consolidation of Appeals of Collection Due Process (CDP) Determinations National Taxpayer Advocate 2005 Annual Report to Congress 451–470.	Consolidate judicial review of CDP hearings in the United States Tax Court, clarify the role and scope of Tax Court oversight of Appeals' continuing jurisdiction over CDP cases, and address the Tax Court's standard of review for the underlying liability in CDP cases.			
Legislative Activity 109th Congress	Pub. L. No. 109-280, § 855, 120 Stat. 1019 (2006).			

Partial Payment Installment Agreements National Taxpayer Advocate 2001 Annual Report to Congress 210–214.	Amend IRC § 6159 to allow the IRS to enter into installment agreements that do not provide for full payment of the tax liability over the statutory limitations period for collection of tax where it appears to be in the best interests of the taxpayer and the IRS.			
Legislative Activity 108th Congress	Pub. L. No. 108-357, § 833, 118 Stat. 1418, 1600 (2004).			
Waiver of Installment Agreement Fees for Low Income Taxpayers National Taxpayer Advocate 2006 Annual Report to Congress 141–156.	Implement an installment agreement (IA) user fee waiver for low income taxpayers and adopt a graduated scale for other IA user fees based on the amount of work required.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee
Strengthen the Independence of the IRS Office of Appeals National Taxpayer Advocate 2009 Annual Report to Congress 346–350.	Strengthen the independence of the IRS Office of Appeals and require at least one appeals officer and settlement officer in each state. In addition the Office of Appeals should be independent from the IRS, should eliminate prohibited *ex parte* communications with the IRS.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3278	Portman/ Cardin	7/26/2018	Referred to Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 1578	Grassley	6/16/2015	Referred to the Finance Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	HR 4375	Johnson	4/17/2012	Referred to the Ways & Means Committee
	S 2291	Cornyn	4/17/2012	Referred to the Finance Committee

Penalties and Interest				
Erroneous Refund Penalty National Taxpayer Advocate 2014 Annual Report to Congress 351; National Taxpayer Advocate 2011 Annual Report to Congress 544.	Amend IRC § 6676 to clarify that the penalty does not apply to individual taxpayers who acted with reasonable cause and in good faith in erroneously claiming a credit or refund. Taking into account all of taxpayers' facts and circumstances in determining whether they had such reasonable cause would bring this statutory penalty into conformity with the TBOR *right to a fair and just tax system*.			
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 209 (2015).			
Protect Good Faith Taxpayers by Expanding the Availability of Penalty Reductions, Establishing Specific Penalty Abatement Procedures, and Providing Appeal Rights National Taxpayer Advocate 2015 Annual Report to Congress 376–382.	Expand the notice period allowing taxpayers to correct their returns and avoid application of the frivolous return penalty from 30 days to 60 days and establish the same mechanism for correcting returns.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Interest Rate and Failure to Pay Penalty National Taxpayer Advocate 2001 Annual Report to Congress 179–182.	Repeal the failure to pay penalty provisions of IRC § 6651 while revising IRC § 6621 to allow for a higher underpayment interest rate.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Interest Abatement on Erroneous Refunds National Taxpayer Advocate 2001 Annual Report to Congress 183–187.	Amend IRC § 6404(e)(2) to require the Secretary to abate the assessment of all interest on any erroneous refund under IRC § 6602 until the date the demand for repayment is made, unless the taxpayer (or a related party) has in any way caused such an erroneous refund. Further, the Secretary should have discretion not to abate any or all such interest where the Secretary can establish that the taxpayer had notice of the erroneous refund before the date of demand and the taxpayer did not attempt to resolve the issue with the IRS within 30 days of such notice.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 109th Congress	HR 726	Sanchez	2/9/2005	Referred to the Ways & Means Committee
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
First Time Penalty Waiver National Taxpayer Advocate 2001 Annual Report to Congress 188–192.	Authorize the IRS to provide penalty relief for first-time filers and taxpayers with excellent compliance histories who make reasonable attempts to comply with the tax rules.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 3991	Houghton	3/19/2002	Defeated in the House

Federal Tax Deposit (FTD) Avoidance Penalty National Taxpayer Advocate 2001 Annual Report to Congress 222.	Reduce the maximum FTD penalty rate from ten to two percent for taxpayers who make deposits on time but not in the manner prescribed in the IRC.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 1793	Grassley	9/12/2017	Referred to Finance Committee
Legislative Activity 109th Congress	HR 3629	Doggett	7/29/2005	Referred to the Ways & Means Committee
	HR 3841	Manzullo	9/2/2005	Referred to the Ways & Means Committee
	S 1321RS	Santorum	6/28/2005	9/15/2006 The Finance Committee, reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
	HR 3991	Houghton	3/19/2002	Defeated in the House
Family Issues				
Uniform Definition of a Qualifying Child National Taxpayer Advocate 2001 Annual Report to Congress 78–100.	Create a uniform definition of “qualifying child” applicable to tax provisions relating to children and family status.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	Pub. L. No. 108-311, § 201, 118 Stat. 1169-1175 (2004).			
Means-Tested Public Assistance Benefits National Taxpayer Advocate 2001 Annual Report to Congress 76–127.	Amend the IRC §§ 152, 2(b) and 7703(b) to provide that means-tested public benefits are excluded from the computation of support in determining whether a taxpayer is entitled to claim the dependency exemption and from the cost of maintenance test for the purpose of head-of-household filing status or “not married” status.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 22	Houghton	1/3/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 5505	Houghton	10/01/2002	Referred to the Ways & Means Committee
Credits for the Elderly or the Permanently Disabled National Taxpayer Advocate 2001 Annual Report to Congress 218–219.	Amend IRC § 22 to adjust the income threshold amount for past inflation and provide for future indexing for inflation.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 107th Congress	S 2131	Bingaman	4/15/2002	Referred to the Finance Committee

Electronic Filing Issues				
Scannable Returns National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, § 5, 70, 91, 96.	Require electronically prepared paper returns to include scannable 2-D code.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3246	Hatch	7/19/2018	Referred to Finance Committee
	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
	S 606	Nelson	3/9/2017	Referred to Finance Committee
Legislative Activity 113th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee
Return Filing and Processing National Taxpayer Advocate 2013 Annual Report to Congress, vol. 2 68-96.	Eliminate the March 31st deadline for e-filed information reports. All information reports, whether e-filed or filed on paper, would be due at the end of February.			
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 201 (2015).			
Safe Harbor for *De Minimis* Errors Returns and Payee Statements National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, § 5, 70, 91, 96.	Safe harbor for *de minimis* errors on information			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 202 (2015).			
Legislative Activity 113th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee
Direct Filing Portal National Taxpayer Advocate 2004 Annual Report to Congress 471–477.	Amend IRC § 6011(f) to require the IRS to post fill-in forms on its website and make electronic filing free to all individual taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5445	Bishop	4/10/2018	Passed in the House
Legislative Activity 112th Congress	S 1289	Carper	6/28/2011	Referred to the Finance Committee
Legislative Activity 110th Congress	S 1074	Akaka	3/29/2007	Referred to the Finance Committee
	HR 5801	Lampson	4/15/2008	Referred to the Ways & Means Committee
Legislative Activity 109th Congress	S 1321RS	Santorum	6/28/2005	9/15/2006 Referred to the Finance Committee; reported by Senator Grassley with an amendment in the nature of a substitute and an amendment to the title; with written report No. 109-336 9/15/2006 Placed on the Senate Legislative Calendar under General Orders; Calendar No. 614
Free Electronic Filing For All Taxpayers National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, § 5, 70, 91, 96	Revise IRC § 6011(f) to provide that the Secretary shall make electronic return preparation and electronic filing available without charge to all individual taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	S 2736	Hatch	7/14/2014	Referred to the Finance Committee

Office of the Taxpayer Advocate				
Repeal or Fix Statute Suspension Under IRC § 7811(d) National Taxpayer Advocate 2015 Annual Report to Congress 316–328.	Repeal suspension of statute of limitations during pending application for Taxpayer Assistance Order or clarify.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 2171	Lewis	4/26/2017	Referred to the Ways & Means Committee
Legislative Activity 114th Congress	HR 4912	Lewis	4/12/2016	Referred to the Ways & Means Committee
Confidentiality of Taxpayer Communications National Taxpayer Advocate 2002 Annual Report to Congress 198–215.	Strengthen the independence of the National Taxpayer Advocate and the Office of the Taxpayer Advocate by amending IRC §§ 7803(c)(3) and 7811. Amend IRC § 7803(c)(4)(A)(iv) to clarify that, notwithstanding any other provision of the IRC, Local Taxpayer Advocates have the discretion to withhold from the IRS the fact that a taxpayer contacted the Taxpayer Advocate Service or any information provided by a taxpayer to TAS.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Access to Independent Legal Counsel National Taxpayer Advocate 2002 Annual Report to Congress 198–215.	Amend IRC § 7803(c)(3) to provide for the position of Counsel to the National Taxpayer Advocate, who shall advise the National Taxpayer Advocate on matters pertaining to taxpayer rights, tax administration, and the Office of Taxpayer Advocate, including commenting on rules, regulations, and significant procedures, and the preparation of *amicus* briefs.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 1528	Portman	6/20/2003	Referred to the Senate
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Taxpayer Advocate Directive National Taxpayer Advocate 2012 Annual Report to Congress 573–602; National Taxpayer Advocate 2002 Annual Report to Congress 419–422.	Amended IRC § 7811 to provide the National Taxpayer Advocate with the non-delegable authority to issue a Taxpayer Advocate Directive to the Internal Revenue Service with respect to any program, proposed program, action, or failure to act that may create a significant hardship for a taxpayer segment or taxpayers at large.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 2333	Cardin	11/30/2015	Referred to the Finance Committee
	HR 4128	Becerra	11/30/2015	Referred to the Ways & Means Committee
	S 949	Cornyn	4/15/2015	Referred to the Finance Committee
	HR 1828	Thornberry	4/15/2015	Referred to the Ways & Means Committee
Legislative Activity 112th Congress	S 3355	Bingaman	6/28/2012	Referred to the Finance Committee
	HR 6050	Becerra	6/28/2012	Referred to the Ways & Means Committee
Legislative Activity 111th Congress	S 3215	Bingaman	4/15/2010	Referred to the Finance Committee
	HR 5047	Becerra	4/15/2010	Referred to the Ways & Means Committee

Codify the Authority to Issue a Taxpayer Advocate Directive National Taxpayer Advocate 2016 Annual Report 39-40	Grant to the National Taxpayer Advocate non-delegable authority to issue a TAD with respect to any IRS program, proposed program, action, or failure to act that may create a significant hardship for a segment of the taxpayer population or for taxpayers at large, and require that, to object to a directive, the IRS would have to respond timely in writing.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5342	LaHood	3/20/2018	Referred to the Ways & Means Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee.
Exempt Organizations (EO)				
EO Judicial and Administrative Review National Taxpayer Advocate 2014 Annual Report to Congress 573–602, 371–379.	Amend IRC § 7428 to allow taxpayers seeking exemption as IRC § 501(c)(4), (c)(5), or (c)(6) organizations to seek a declaratory judgment on the same footing as those seeking exempt status as IRC § 501(c)(3) organizations.			
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 406 (2015).			
Notification to Exempt Organizations National Taxpayer Advocate 2011 Annual Report to Congress 444.	Require the IRS to notify exempt organizations that have not filed an annual notice or return for two consecutive years that the IRS has no record of receiving a return or notice and that the organization's exemption will be revoked if it does not file by the next filing deadline.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders
Training				
Comprehensive Training Strategy National Taxpayer Advocate 2017 Annual Report to Congress 84-92.	Increase "train the trainer" in-person trainings to allow for more effective delivery of training to field offices; increase training hours per employee, particularly in mission critical job series; encourage employees to identify outside training relevant to their jobs and allow the employees to attend such trainings; and include outside experts in training to leverage knowledge gained from working with taxpayers who are impacted by IRS actions.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/10/2018

Other Issues				
Modify Internal Revenue Code Section 6707A to Ameliorate Unconscionable Impact National Taxpayer Advocate 2008 Annual Report to Congress 419–422.	Modify IRC § 6707A to ameliorate unconscionable impact. Section 6707A of the IRC imposes a penalty of $100,000 per individual per year and $200,000 per entity per year for failure to make special disclosures of a "listed transaction."			
	Bill Number	Sponsor	Date	Status
Legislative Activity 111th Congress	Pub. L. No. 111-124, § 2041 Stat. 2560 (2010).			
	S 2771	Baucus	11/16/2009	Referred to the Finance Committee
	HR 4068	Lewis	11/16/2009	Referred to the Ways & Means Committee
	S 2917	Baucus	12/18/2009	Referred to the Finance Committee
Eliminate Tax Strategy Patents National Taxpayer Advocate 2007 Annual Report to Congress 512–524.	Bar tax strategy patents, which increase compliance costs and undermine respect for congressionally-created incentives, or require the PTO to send any tax strategy patent applications to the IRS so that abuse can be mitigated.			
Legislative Activity 112th Congress	Pub. L. No. 112-29 § 14(a), 125 Stat. 284, 327 (2011).			
Restrict Tax Return Disclosures to Necessary Content National Taxpayer Advocate 2007 Annual Report to Congress 554–555.	Limit the disclosure of tax returns and tax return information requested through taxpayer consent solely to the extent necessary to achieve the purpose for which consent was requested.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	S 3278	Portman/ Cardin	7/26/2018	Referred to the Finance Committee
	S 3246	Hatch	7/19/2018	Referred to the Finance Committee
	HR 5444	Jenkins	4/10/2018	Passed in the House, received in the Senate 4/19/2018 and referred to the Finance Committee
	HR 5445	Bishop	4/10/2018	Passed in the House
	HR 3340	Doggett	7/20/2017	Referred to the Ways & Means Committee
Disclosure Regarding Suicide Threats National Taxpayer Advocate 2001 Annual Report to Congress 227.	Amend IRC § 6103(i)(3)(B) to allow the IRS to contact and provide necessary return information to specified local law enforcement agencies and local suicide prevention authorities, in addition to federal and state law enforcement agencies in situations involving danger of death or physical injury.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 112th Congress	HR 1528	Portman	6/20/2003	5/19/2004 Passed/agreed to in the Senate, with an amendment
	S 882	Baucus	4/10/2003	5/19/2004 S 882 was incorporated in HR 1528 through an amendment and HR 1528 passed in lieu of S 882
	HR 1661	Rangel	4/8/2003	Referred to the Ways & Means Committee
Legislative Activity 107th Congress	HR 586	Lewis	2/13/2001	4/18/2002 Passed the House with an amendment; referred to the Senate
Attorney Fees National Taxpayer Advocate 2002 Annual Report to Congress 161–171.	Allow successful plaintiffs in nonphysical personal injury cases who must include legal fees in gross income to deduct the fees "above the line." Thus, the net tax effect would not vary depending on the state in which a plaintiff resides.			
Legislative Activity 108th Congress	Pub. L. No. 108-357, § 703, 118 Stat. 1418, 1546-48 (2004).			

Attainment of Age Definition National Taxpayer Advocate 2003 Annual Report to Congress 308–311.	Amend IRC § 7701 by adding a new subsection as follows: "Attainment of Age. An individual attains the next age on the anniversary of his date of birth."			
	Bill Number	Sponsor	Date	Status
Legislative Activity 108th Congress	HR 4841	Burns	7/15/2004	7/21/2004 Passed the House; 7/22/2004 Received in the Senate
Home-Based Service Workers (HBSW) National Taxpayer Advocate 2001 Annual Report to Congress 193–201.	Amend IRC § 3121(d) to clarify that HBSWs are employees rather than independent contractors.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 110th Congress	HR 5719	Rangel	4/16/2008	Referred to the Finance Committee
Legislative Activity 107th Congress	S 2129	Bingaman	4/15/2002	Referred to the Finance Committee
Restrict Access to the Death Master File (DMF) National Taxpayer Advocate 2011 Annual Report to Congress 519–523.	Restrict access to certain personally identifiable information in the DMF. The National Taxpayer Advocate is not recommending a specific approach at this time, but outlines several available options.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 113th Congress	H.J. Res. 59, 113th Cong. § 203 (2013).			
Legislative Activity 112th Congress	S 3432	Nelson	7/25/2012	Referred to the Finance Committee
	HR 6205	Nugent	7/26/2012	Referred to the Ways & Means Committee
Amend the Adoption Credit to Acknowledge Jurisdiction of Native American Tribes National Taxpayer Advocate 2012 Annual Report to Congress 521.	Amend IRC § 7871(a) to include the adoption credit (IRC § 23) in the list of Code sections for which a Native American tribal government is treated as a "State".			
	Bill Number	Sponsor	Date	Status
Legislative Activity 114th Congress	S 835	Heitkamp	3/23/2015	Referred to the Finance Committee
	HR 1542	Kilmer	3/23/2015	Referred to the Ways & Means Committee
Legislative Activity 113th Congress	S 835	Johnson	7/09/2014	Referred to the Finance Committee
	HR 1738	Kilmer	6/12/2013	Referred to the Ways & Means Committee
Filing Due Dates of Partnerships and Certain Trusts National Taxpayer Advocate 2003 Annual Report to Congress 302.	Amend Internal Revenue Code section 6072(a) to change the regular filing deadline for partnerships described in Section 6031 and trusts described in Section 6012(a)(4) as follows: ◆ For partnerships and trusts making returns on the basis of a calendar year: Change the regular filing deadline from the 15th day of April following the close of the calendar year to the 15th day of March following the close of the calendar year. ◆ For partnerships and trusts making returns on the basis of a fiscal year: Change the regular filing deadline from the 15th day of the fourth month following the close of the fiscal year to the 15th day of the third month following the close of the fiscal year.			
Legislative Activity 114th Congress	Pub. L. No. 114-41 § 2006, 129 Stat. 443, 457 (2015).			
Foreign Account Reporting National Taxpayer Advocate 2014 Annual Report to Congress 331.	Align the FBAR filing deadline and threshold(s) with the Form 8938 filing deadline and threshold(s). Change the FBAR filing due date to coincide with the due date applicable to a taxpayer's federal income tax return and Form 8938 (including extensions).			
Legislative Activity 114th Congress (July 31, 2015)	Pub. L. No. 114-41 § 2006, 129 Stat. 443, 458-459 (2015).			

Individual Taxpayer Identification Numbers (ITINs)				
Requirements for the Issuance of ITINs National Taxpayer Advocate 2008 Annual Report to Congress 126; National Taxpayer Advocate 2010 Annual Report to Congress 319.	Administrative recommendation that the IRS should promote the Certified Acceptance Agent program and use other federal agencies to perform acceptance agent duties as contemplated in the Treasury Regulation (*e.g.*, the Postal Service performs a similar service in processing passport applications).			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5361	Paulsen	3/21/2018	Referred to the Ways & Means Committee
Legislative Activity 114th Congress (July 31, 2015)	Pub. L. No. 114-113, Division Q § 203 (2015).			
Develop a Process To Verify That Previously Issued ITINs Have Been Used for Tax Administration Purposes National Taxpayer Advocate 2008 Annual Report to Congress 126; National Taxpayer Advocate 2010 Annual Report to Congress 319.	Administrative recommendation the IRS should develop a process to verify that previously issued ITINs have been used for tax administration purposes and revoke unused ITINs on a regular basis after notifying ITIN holders.			
Legislative Activity 114th Congress	Pub. L. No. 114-113, Division Q § 203 (2015).			
Whistleblower National Taxpayer Advocate 2015 Annual Report to Congress 409–412.	Amend IRC § 7623 to include anti-retaliation protection for tax whistleblowers and impose a penalty on whistleblowers for unauthorized disclosure of tax information.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 7227	Jenkins	12/10/2018	Passed the House on 12/20/2018, received in the Senate 12/20/2018
	S 3246	Hatch	7/19/2018	Referred to Finance Committee
	S 762	Grassley	3/29/2017	Referred to Finance Committee
Legislative Activity 114th Congress	S 3156	Hatch	7/12/2016	Placed on Senate Legislative Calendar under General Orders

Military Issues				
Funding for Stakeholder Partnerships, Education & Communication (SPEC) National Taxpayer Advocate 2017 Annual Report 151–164	Create a special unit of SPEC staffed with veterans whose responsibilities are to develop and conduct outreach, education, and assistance to current military taxpayers, including National Guard and Reservists, and to those organizations that provide tax assistance to these taxpayers. ◆ Allocate ample funding for SPEC to provide face-to-face training for military VITA volunteers in overseas locations, ◆ Assign a dedicated IRS employee to routinely update the military information on irs.gov website, ◆ Provide a year-round dedicated toll-free telephone line for service members and their families to answer tax law and filing questions, and to resolve their tax account and compliance issues.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 115th Congress	HR 5479	Walz	4/11/2018	Referred to the Ways & Means Committee

LR #1

IT MODERNIZATION: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan that Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the Position of the Internal Revenue Service and Be Heard*
- *The Right to Appeal a Decision of the Internal Revenue Service in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to Retain Representation*
- *The Right to a Fair and Just Tax System*

PROBLEM

The IRS is the Accounts Receivable Department of the Federal government. In fiscal year (FY) 2018, the IRS collected nearly $3.5 trillion on a budget of $11.43 billion.[2] Put differently, for every dollar the IRS received in appropriated funds, it collected about $300 in federal revenue. Both because the fiscal health of the Federal government depends on the IRS's collection capability and because the taxpayers who pay our nation's bills deserve fair treatment, it is critical that the IRS has the resources to do its job effectively and efficiently.

The IRS does not have adequate information technology (IT) systems to do its job effectively and efficiently. The IRS's core IT systems are among the oldest in the Federal government, limiting the agency's capabilities in significant ways. Partly due to historic poor planning and execution and partly due to lack of funding, the IRS has been unable to replace its antiquated systems. Every year, instead, it layers more and more smaller systems and applications onto its core systems. By analogy, the IRS has erected a 50-story office building on top of a creaky, 60-year-old foundation, and it is adding a few more floors every year. There are inherent limitations on the functionality of a 60-year-old infrastructure, and at some point, the entire edifice is likely to collapse.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code. *See* IRC § 7803(a)(3).

2 *See* Government Accountability Office (GAO), GAO 19-150, Financial Audit: IRS's Fiscal Year (FY) 2018 and 2017 Financial Audits 23 (Nov. 2018) (showing revenue collections); H.R. Rep. No. 115-792, at 14 (2018) (showing appropriation levels).

According to the Government Accountability Office (GAO), the IRS's Individual Master File (IMF) and Business Master File (BMF) systems date to about 1960 and are the two oldest IT systems in the federal government among the major IT systems it surveyed.[3]

The GAO describes the IMF as follows:

> [The IMF] is the authoritative data source of individual taxpayer accounts. Within IMF, accounts are updated, taxes are assessed, and refunds are generated as required during each tax filing period. Virtually all IRS information system applications and processes depend on output, directly or indirectly, from this data source.
>
> IMF was written in an outdated assembly language code and operates on a 2010 IBM z196/2817-m32 mainframe. This has resulted in difficulty delivering technical capabilities addressing identity theft and refund fraud, among other things. In addition, there is a risk of inaccuracies and system failures due to complexity of managing dozens of systems synchronizing individual taxpayer data across multiple data files and databases, limitations in meeting normal financial requirements and security controls, and keeping pace with modern financial institutions.[4]

It bears emphasis that *"[v]irtually all IRS information system applications and processes depend on output, directly or indirectly, from [the IMF]."* IRS IT leaders regularly point out that there is an important distinction between modernizing IT capabilities and modernizing IT core systems. To extend the above analogy, hundreds of IRS systems and applications are resting on the foundation of a 60-year-old office building. Because the building has not yet collapsed, there is an implicit assumption that more floors can be added indefinitely. They cannot.

On April 17, 2018, the filing deadline for 2017 federal income tax returns, an IRS systems crash prevented taxpayers from electronically submitting their tax returns and payments. The crash was attributed to a malfunction in an 18-month-old piece of hardware supporting the IMF—a system that requires more and more support every year.[5] The GAO's director of IT management warned in congressional testimony shortly before the 2018 filing season began that "relying on these antiquated systems for our nation's primary source of revenue is highly risky, meaning the chance of having a failure during the filing season is continually increasing."[6] The damage from the crash was limited because the IRS gave taxpayers an extra day to file and pay. However, the crash had the effect of creating significant confusion and anxiety among taxpayers and their preparers, and it served as an important wake-up call and a warning of future problems if the IRS is unable to replace its legacy systems soon.

Since 2009, the IRS has been taking steps to replace the IMF with a system known as the Customer Account Data Engine 2 (CADE 2). Its goal is to transition the IMF's functionality and data to CADE 2 and to retire the IMF. To date, however, the IRS has not been able to complete this transition.

---

3 GAO, GAO-16-468, *Information Technology: Federal Agencies Need to Address Aging Legacy Systems* 28-30 (May 2016).

4 *Id.* at 53.

5 *See* Aaron Boyd & Frank Konkel, *IRS' 60-Year-Old IT System Failed on Tax Day Due to New Hardware*, Nextgov (Apr. 19, 2018) (citing an IRS official), https://www.nextgov.com/it-modernization/2018/04/irs-60-year-old-it-system-failed-tax-day-due-new-hardware/147598.

6 *See* Frank Konkel, *The IRS System Processing Your Taxes is Almost 60 Years Old*, Nextgov (Mar. 19, 2018) (quoting David Powner, GAO's director of Information Technology Management Issues), https://www.nextgov.com/it-modernization/2018/03/irs-system-processing-your-taxes-almost-60-years-old/146770.

Moreover, it has not been able to make comparable progress in retiring the BMF system (which is the authoritative source of individual *business* taxpayer accounts) or several other key legacy systems.

Apart from the risk of catastrophic collapse, the absence of modern IT systems prevents the IRS from doing its job as effectively as it could on a daily basis. The result is that taxpayers are harmed, practitioners are inconvenienced, and the IRS is hampered in delivering on its mission to provide U.S. taxpayers top quality service and apply the tax law with integrity and fairness to all.

EXAMPLES

Customer Callback. Over the past decade, the IRS has received an average of more than 100 million telephone calls each year.[7] We report regularly on IRS telephone performance, including the percentage of calls the IRS answers and the average time taxpayers spend waiting on hold. Performance has varied widely, with the IRS reporting an annual "Level of Service" on its Accounts Management lines from as low as 38 percent in FY 2015 to as high as 77 percent in FY 2017. The average length of time taxpayers spend waiting on hold has also varied considerably, from as few as seven minutes in FY 2018 to as many as 30 minutes in FY 2015.[8]

Most telephone call centers maintained by large businesses and federal agencies, including the Social Security Administration and the Department of Veterans Affairs, offer a "customer callback" feature. That is, in lieu of waiting on hold for long periods of time, callers may elect to receive a call back when the next customer service representative is available. Despite the large volume of calls it receives, the IRS still does not have this technology.[9]

In the President's FY 2015 and FY 2016 budgets, the IRS proposed adding customer callback and estimated it would cost about $3.3 million to acquire the technology.[10] In November 2015, however, Commissioner Koskinen said that although the customer callback technology itself would cost only about $3.5 million, *the IRS had determined its phone system would need to be upgraded to be able to run the customer callback technology—and the upgrade would cost about $45 million.*[11] We understand the IRS has finally decided to absorb the cost of implementing a customer callback feature. This is a very positive development for taxpayers and practitioners. However, the time, effort, and cost it has required to implement this feature illustrates the challenges the IRS consistently faces as it tries to modernize its capabilities based on antiquated technology platforms.

Case Management Systems. The IRS currently maintains approximately 60 major case management systems. The systems are distinct, often requiring an IRS employee seeking information about a taxpayer to conduct searches on multiple systems. This results in poor customer service, because when a taxpayer or practitioner calls the IRS with an account question, the customer service representative who answers the phone often does not have access to the system on which the relevant taxpayer information

7 IRS, Joint Operations Center, *Snapshot Reports: Enterprise Snapshot* (final week of each fiscal year for FY 2009 through FY 2018).

8 *Id.* For additional discussion regarding IRS telephone service, see National Taxpayer Advocate 2017 Annual Report to Congress 22-35 (Most Serious Problem: Telephones*: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Experience*).

9 *Id.* at 31-32.

10 *See* IRS, Congressional Justification for Appropriations accompanying the President's FY 2015 Budget at IRS-20 (2014); IRS, Congressional Justification for Appropriations accompanying the President's FY 2016 Budget at IRS-22 (2015).

11 *See* Lisa Rein, *IRS Customer Service Will Get Even Worse This Tax Filing Season, Tax Chief Warns*, Washington Post.com, Nov. 3, 2015.

is stored. This imposes limits on IRS compliance activities for similar reasons. The IRS has been making plans to develop an integrated enterprise-wide case management system, so that IRS employees can see information from all 60 systems in a single search (with varying levels of "permissions" so that, for example, only employees with a need to know would be able to view certain information). However, the IRS has not yet had sufficient personnel or financial resources to develop and implement an integrated system. As a result, the inefficiencies of maintaining 60 separate systems continue to plague the agency.[12]

Online Taxpayer Accounts. In the IRS's Future State plan and, more recently, in its FY 2018-2022 Strategic Plan, the IRS is placing significant emphasis on the development and use of online taxpayer accounts.[13] Robust online accounts would, indeed, be very helpful to many taxpayers, who could view all of their account information online and, in many cases, submit account inquiries through their online accounts, much as they can do with online bank accounts. However, the technology limitations described above—most significantly, the absence of an integrated case management system—limit the IRS in making complete account information available to taxpayers. As a result, taxpayers accustomed to using online accounts with financial institutions and other vendors experience frustration, and more IRS employees are needed to answer phone calls and respond to correspondence about matters that many taxpayers would handle quickly and efficiently online if the functionality were available.

Online Practitioner Accounts. Taxpayer representatives, even more than taxpayers, would benefit enormously from online account access. While a typical taxpayer can go many years without having to contact the IRS with account questions, practitioners often have to contact IRS personnel multiple times a day. Hold times on the Practitioner Priority Service telephone line can be long,[14] and hold times when practitioners must call the IRS's compliance telephone lines can be even longer. Practitioners often charge their taxpayer-clients for the time they spend waiting on hold, increasing tax compliance costs, and for some inquiries—such as balance inquiries, requests for transcripts, or obtaining copies of correspondence—telephone calls are not nearly as effective as a robust online account.

Provision of Information About TAS to Taxpayers. Old technology prevents the IRS from doing things big and small. One specific example involves compliance with a requirement imposed by the IRS Restructuring and Reform Act of 1998 that the IRS include information about a taxpayer's local TAS office in statutory notices of deficiency.[15] TAS offices are aligned with taxpayer populations by ZIP code. It would seem like a relatively easy task for the IRS to program its systems to generate the address and telephone number of the local TAS office on statutory notices of deficiency based on the ZIP code of the taxpayer. The IRS currently uses approximately 20 versions of a statutory notice of deficiency, which vary based on which IRS function issues the notice and certain other factors, and the IRS is, indeed, able to include information about the local TAS office on most versions. However, it lacks the IT capability to include information about the local TAS office on other versions. As a result, IRS personnel must either manually place "stuffer" notices listing all TAS offices in the envelopes with certain statutory notices of deficiency or provide a single website address, thereby failing to identify

12 For additional discussion on IT challenges relating to the IRS's case management systems, see National Taxpayer Advocate FY 2019 Objectives Report to Congress 47-51 (Area of Focus: *The IRS's Enterprise Case Management Project Shows Promise, But to Achieve 21st Century Tax Administration, the IRS Needs an Overarching Information Technology Strategy with Proper Multi-Year Funding*).

13 *See* IRS Pub. 3744, Internal Revenue Service Strategic Plan FY 2018-2022, at 10-12 (rev. 4/2018).

14 Practitioner Priority Service (PPS) is a nationwide toll-free, account-related service for all types of tax practitioners. PPS serves tax practitioners as the first point of contact for assistance regarding account-related issues. For more information about PPS, see IRM 21.3.10, *Taxpayer Contacts Practitioner Priority Service (PPS)* (Sept. 17, 2018).

15 Pub. L. No. 105-206, § 1102(b), 112 Stat. 685, 703 (1998) (codified at IRC § 6212(a)).

which specific TAS office is aligned with the taxpayer's location and requiring IRS employees to perform work that should be fully automated.[16]

Identification of SSDI Recipients. In 2016, the Commissioner decided not to assign collection cases involving taxpayers who receive Social Security Disability Insurance (SSDI) to private collection agencies (PCAs) because SSDI recipients are, almost by definition, taxpayers who are in economic hardship and would be placed into "currently not collectible – hardship" status if the IRS were to perform a financial analysis. The IRS still has not implemented this decision. Although the IRS receives and processes Forms SSA-1099 with respect to SSDI recipients, the IRS system used to assign cases to PCAs cannot currently be programmed to pull information from the IRS system that houses Form 1099 information. Therefore, the IRS reports there is no practical way for it to exclude these cases.

RECOMMENDATION

Provide the IRS with additional dedicated, multi-year funding to replace its core legacy IT systems pursuant to a plan that sets forth specific goals and metrics and is evaluated annually by an independent third party.[17]

PRESENT LAW

The IRS receives its funding through annual appropriations acts.[18] The IRS budget is divided into four accounts: Taxpayer Services, Enforcement, Operations Support, and Business Systems Modernization (BSM). The BSM account is the principal source of funding for replacing the IRS's core IT systems.

Funding for the BSM account has fluctuated considerably in recent years with Congress reducing BSM funding by 62 percent from FY 2017 ($290 million) to FY 2018 ($110 million). Even at the higher level, BSM funding constitutes just a small fraction of the IRS's overall budget, as shown in Figure 2.1.1:

16 For additional discussion of this issue, see Statutory Notices of Deficiency: *The IRS Fails to Clearly Convey Critical Information in Statutory Notices of Deficiency, Making It Difficult for Taxpayers to Understand and Exercise Their Rights, Thereby Diminishing Customer Service Quality, Eroding Voluntary Compliance, and Impeding Case Resolution*, *supra*.

17 The GAO has also recommended that the IRS modernize and replace legacy systems. *See* GAO-18-153T, *Information Technology: Management Attention Is Needed to Successfully Modernize Tax Processing Systems* 10 (Oct. 2017).

18 The IRS receives a relatively small amount of additional funds from charging user fees for certain services.

FIGURE 2.1.1, IRS Appropriations – FYs 2017–2019[19]

Fiscal Year	BSM Funding	Total IRS Funding	BSM as % of Total IRS Funding
2017	$290 M	$11.24 B	2.6%
2018	$110 M	$11.43 B	1.0%
2019 (House Bill)	$200 M	$11.62 B	1.7%
2019 (Senate Bill)	$110 M	$11.26 B	1.0%

Most IRS funding is required to be spent within the fiscal year for which it is appropriated, but the IRS is generally given up to three years to spend its BSM funding.

REASONS FOR CHANGE

IRS IT leaders regularly point out that there is an important distinction between modernizing IT capabilities and modernizing IT core systems. New applications generally can be added to existing systems, and in the short term, those applications are generally sufficient to accomplish their intended goal. But as the IRS's former chief technology officer has emphasized in congressional testimony, the programming language and data structures of the IMF, BMF and other legacy systems "were built decades ago when computer infrastructure, such as computer memory and storage media, were tape-based, and computational machinery was extremely expensive."[20]

As a result, the former IRS chief technology officer said:

> [W]e have upgraded the underlying hardware and operating systems of these legacy systems, while the application programming language and data structures have essentially remained static …. The situation is analogous to operating a 1960's automobile with the original chassis, suspension and drive train, but with a more modern engine, satellite radio, and a GPS navigation system. It runs better than the original model but not nearly as efficiently as a system bought today."[21]

As discussed above, the pervasive technology limitations the IRS faces stem from the age of its core systems. It is always cheaper and easier in the short run to apply a patch than to replace a core system, but patch upon patch is simply not sustainable for several reasons.

First, there are inherent limitations in using nearly 60-year-old information technology. The examples above identify some of them. Although the IRS is constantly developing new systems and applications to meet new needs, the static data structures and programming language impede their effectiveness. The former IRS chief technology officer put it this way: "The main challenge posed by our legacy

---

19 For FY 2017 IRS funding levels, see Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, Division E, 131 Stat. 135, 331-334 (2017). For FY 2018 IRS funding levels, see Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Division E, 132 Stat. 348, 540-543 (2018). At this writing, the FY 2019 appropriations act that funds the Treasury Department has not been finalized. For House-proposed funding levels, see H.R. Rep. No. 115-792, at 14 (2018) (accompanying H.R. 6258, which was subsequently incorporated into and passed by the House as H.R. 6147, Division B, at 168-176, 115th Cong. (2018)). For Senate-proposed funding levels, see S. Rep. No. 115-281, at 25 (2018) (accompanying S. 3107, at 12-19, 115th Cong. (2018)).

20 IRS Legacy Information Technology Systems: Hearing Before the House Comm. on Oversight and Government Reform, 114th Cong. (2016) (statement of Terence Milholland, Chief Technology Officer, Internal Revenue Service).

21 *Id.*

systems is that their data structures do not allow us to easily use the data in our downstream service and compliance systems to best serve taxpayers."[22]

Second, the older a system becomes, the more difficult it is to maintain. Fewer and fewer computer programmers are conversant with assembly language code and other old programming languages. Because significant programing of legacy systems is still required to prepare for each filing season and for other purposes, the shrinking pool of qualified programmers poses a significant and growing concern.

Third, the older a system becomes, the more expensive it is to maintain. Warranties on IRS legacy systems have long since expired, and some parts are no longer manufactured. Over time, the costs of maintaining legacy systems will continue to increase. For that reason, replacing these systems sooner rather than later is likely to reduce maintenance costs substantially.

Fourth, systems upgrades become more challenging when they are implemented over extended periods of time. Technology that is current at the time a new system is conceived may be obsolete five years later. Therefore, managers of long-term projects are more likely to confront difficult decisions about whether to hew to original plans or to modify them to incorporate newer technology. Newer technology often is more robust and effective, but changing plans mid-stream can create complications and increase costs. If the IRS were given the resources to modernize its systems at a pace comparable to the private sector, some of these challenges could be avoided.

EXPLANATION OF RECOMMENDATION

We believe the IRS requires significant additional funding to replace its core legacy systems with new IT systems. Given the central role technology and automation play in virtually every aspect of IRS operations, the IRS budget should reflect their importance. It is hard to imagine a large corporation as dependent on technology as the IRS would spend only one percent or two percent of its budget on IT systems upgrades.

Rather than making overall progress in modernizing its legacy systems, some indicators suggest the IRS is still losing ground. According to the Treasury Inspector General for Tax Administration, the percentage of the IRS's IT hardware classified as "aged" increased from 40 percent at the beginning of FY 2013 to 64 percent at the beginning of FY 2017.[23] The IRS requires sufficient resources to reverse that trend.

We also believe the IRS requires a more predictable flow of funds. Fluctuations in BSM funding from $290 million in FY 2017, to $110 million in FY 2018, to somewhere between $110 and $200 million in FY 2019 preclude the agency from defining the scope of its upgrades and delivering its projects on time and on budget. If the agency developed an IT plan in FY 2017 on the assumption that it would continue to receive $290 million a year, it necessarily would fail to meet its goals when the FY 2018 BSM funding level was cut by 62 percent.

22 IRS Legacy Information Technology Systems: Hearing Before the House Comm. on Oversight and Government Reform, 114th Cong. (2016) (statement of Terence Milholland, Chief Technology Officer, Internal Revenue Service).

23 Treasury Inspector General for Tax Administration, Ref. No. 2017-20-051, *Sixty-Four Percent of the Internal Revenue Service's Information Technology Hardware Infrastructure Is Beyond Its Useful Life* (Sept. 2017).

We are not advocating that Congress provide the IRS with a blank check. Significant IT projects are challenging, and historically, the IRS has often failed to produce projected results timely and at budgeted levels. While a portion of its IT failures are likely attributable to insufficient funding or uneven funding streams, another portion is attributable to poor planning and execution. Therefore, we believe that before Congress provides additional funding, it should (i) require the IRS to present a comprehensive IT modernization plan with time frames and cost projections; (ii) directly or through the IRS request an independent assessment of the plan's effectiveness and feasibility from a third-party entity with technology expertise; and (iii) require annual reports on the IRS's progress in meeting its targets from an independent third party with technology expertise.

On balance, we believe the IRS has done a better job of developing and executing its IT modernization plans in recent years. We note that the GAO had included the BSM program on its "High Risk List" for 18 years beginning in 1995, but removed it in 2013 based on agency progress.[24] Similarly, a recent Senate Appropriations subcommittee report said that "the IRS has, in recent years, satisfied the majority of developmental milestones planned for competition early, under budget, or within ten percent of cost and schedule estimates."[25] These are positive signs. With additional funding and proper oversight, we are optimistic the IRS can continue to modernize its IT systems, produce better taxpayer service and compliance results, and ultimately reduce its IT systems maintenance costs as well.

24 IRS Legacy Information Technology Systems: Hearing Before the House Comm. on Oversight and Government Reform, 114th Cong. (2016) (statement of Terence Milholland, Chief Technology Officer, Internal Revenue Service).

25 S. Rep. No. 115-281, at 34 (2018).

LR #2

ADMINISTRATIVE APPEAL RIGHTS: Amend Internal Revenue Code Section 7803(a) to Provide Taxpayers With a Legally Enforceable Administrative Appeal Right Within the IRS Unless Specifically Barred by Regulations

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to a Fair and Just Tax System*

PROBLEM

Congress has long understood the importance of an independent Appeals function within the IRS as a means of facilitating case resolutions and minimizing litigation, which is burdensome to both taxpayers and the government. Accordingly, Congress mandated the creation of the IRS Office of Appeals (Appeals) as an independent function within the IRS as part of the IRS Restructuring and Reform Act of 1998 (RRA 98).[2] As explained by Senator William Roth:

> One of the major concerns we've listened to throughout our oversight initiative—a theme that repeated itself over and over again—was that the taxpayers who get caught in the IRS hall of mirrors have no place to turn that is truly independent and structured to represent their concerns. With this legislation, we require the agency to establish an independent Office of Appeals—one that may not be influenced by tax collection employees or auditors.[3]

Appeals subsequently adopted this charge as its guiding principle: "The Appeals Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service."[4] Appeals, however, is unable to perform its intended role when its jurisdiction is curtailed by various means, such as precipitous issuance of statutory notices of deficiency (SNOD) or the use of the "sound tax administration" rationale as a reason for bypassing Appeals.[5] The National Taxpayer Advocate has repeatedly warned against depriving taxpayers of their *right to appeal an IRS decision in an independent forum*, a right that was adopted by the IRS in 2014 and reaffirmed by Congress in 2015.[6] Circumventing Appeals causes the IRS to waste resources and taxpayers to incur needless expense, delay, and uncertainty, all of which undermine sound tax administration.

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689 (1998).

3 144 Cong. Rec. S7622 (July 8, 1998) (Statement of Sen. Roth).

4 Internal Revenue Manual (IRM) 8.1.1.1(1), *Accomplishing the Appeals Mission* (Oct. 1, 2016).

5 National Taxpayer Advocate Fiscal Year (FY) 2016 Objectives Report to Congress 66-69. Certain IRS officials have the power to determine "that a docketed case or issue will not be referred to Appeals." Rev. Proc. 2016-22, § 3.03, 2016-15 I.R.B. 577, 578.

6 IRS News Release IR-2014-72 (June 10, 2014); IRC § 7803(a)(3)(E). *See* National Taxpayer Advocate FY 2019 Objectives Report to Congress 140-141; National Taxpayer Advocate FY 2016 Objectives Report to Congress 66-69; National Taxpayer Advocate 2015 Annual Report to Congress 376-382.

EXAMPLE

Taxpayer, a diversified business, enters into a transaction that the IRS believes to be suspiciously similar to a type of transaction it has previously identified as a tax shelter. As a result, the IRS asserts large deficiencies and penalties against Taxpayer. Thereafter, Taxpayer files a protest with Appeals, arguing that the transaction in question is fundamentally different from the tax shelter transaction with which the IRS is attempting to equate it. Further, Taxpayer contends that, in addition to being distinguishable from a tax shelter, the transaction in question has a legitimate business purpose, and should not generate either tax deficiencies or penalties.

The Office of Chief Counsel, however, unilaterally decides that Taxpayer should not have the opportunity to raise these arguments at Appeals. Instead, Counsel determines that the case should proceed directly to litigation on the basis of "sound tax administration." As a result, Taxpayer is unable to present its arguments to an independent third party within the IRS and is prevented from seeking the administrative case resolution it believes could have been achieved. Instead, Taxpayer is forced to pursue its case in court, as a matter of public record, incurring substantial cost, delay, and ill-will for the IRS along the way.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that Congress amend § 7803(a) to establish an independent Office of Appeals and grant taxpayers the right to a prompt administrative appeal within the IRS that provides an impartial review of all compliance actions and an explanation of the Appeals decision, except where the Secretary has determined, pursuant to regulations, that an appeal is not available, including on the basis of designation for litigation or adoption of a frivolous position. Where an appeal is not available, the Secretary shall furnish taxpayers with the procedures for protesting to the Commissioner the decision to bar an appeal in these circumstances.

PRESENT LAW

Since 1955, the IRS's Statement of Procedural Rules has provided that taxpayers have the right to an administrative appeal.[7] However, courts have held that the IRS is not bound by its own procedural rules.[8] In addition, Rev. Proc. 87-24 clarified that certain IRS officials could "determine that a case, or an issue or issues in a case, should not be considered by Appeals."[9] Specifically, cases or issues can be designated for litigation if they "present recurring, significant legal issues affecting large numbers of taxpayers. When there is a critical need for enforcement activity with respect to such issues, cases are designated for litigation in the interest of sound tax administration to establish judicial precedent,

7 20 Fed. Reg. 4621, 4626 (June 30, 1955) (codified at 26 C.F.R. § 601.106(b), which provided that if the IRS "has issued a preliminary or '30-day letter'" and the taxpayer has filed a timely protest, "the taxpayer has the right (and will be so advised by the district director) of administrative appeal."). The situations in which a taxpayer may request an appeal are now at 26 C.F.R. § 601.106(b)(3).

8 *See Ward v. Comm'r*, 784 F.2d 1424, 1430-31 (9th Cir. 1986); Estate of *Weiss v. Comm'r*, T.C. Memo. 2005-284. *But see*, *Richardson v. Joslin*, 501 F.3d 415, 418 (5th Cir. 2007) ("[A]n agency must abide by its own regulations.") (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) (IRS bound by instructions given to Special Agents); *Rauenhorst v. Comm'r*, 119 T.C. 157 (2002) (IRS bound by revenue rulings).

9 Rev. Proc. 87-24, 1987-1 C.B. 720, *superseded by* Rev. Proc. 2016-22, 2016-15 I.R.B. 577. The superseding Revenue Procedure clarifies and elaborates on Rev. Proc 87-24, stating, among other things, that Division Counsel or a higher level Counsel can determine that referral to Appeals is not in the interest of sound tax administration.

conserve resources, or reduce litigation costs for the Service and taxpayers."[10] Typically, the decision of whether or not to designate a given case or issue for litigation requires consultation and approval of a range of parties.[11] Depending upon the procedural posture of the case or issue, these parties can include the operating division with jurisdiction, Chief Counsel, and the Chief of Appeals.[12]

Subsequently, RRA 98 granted taxpayers the statutory right to an administrative appeal in certain circumstances.[13] In particular, these circumstances involve Collection Due Process cases and offers-in-compromise.[14] Even in these instances, however, no right to appeal exists in the case of a frivolous position adopted by a taxpayer.[15]

In late 2015, the IRS requested public comments on procedures that would deny taxpayers the right to go to Appeals if the "referral is not in the interest of sound tax administration," even in cases not designated for litigation.[16] The American Bar Association Section of Taxation suggested that the IRS "elaborate and clarify the limited circumstances in which docketed cases will be ineligible to be returned to Appeals due to 'sound tax administration.'"[17] However, the IRS finalized these procedures as Rev. Proc. 2016-22 without addressing this comment. The IRS did not explain why it declined to elaborate on or clarify this standard, which, at least at this point, appears to be both vague and open-ended.[18]

At the National Taxpayer Advocate's urging, the IRS adopted the Taxpayer Bill of Rights (TBOR) in 2014 and incorporated it into Publication 1, *Your Rights as a Taxpayer*.[19] The TBOR was subsequently enacted by Congress in 2015 and was codified as IRC § 7803(a)(3), which states that the "Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including— … the right to appeal a decision of the Internal Revenue Service in an independent forum."[20] As further elaborated

---

10 Chief Counsel Directives Manual (CCDM) 33.3.6.1(1), *Purpose and Effect of Designating a Case for Litigation* (Aug. 11, 2004).

11 CCDM 33.3.6.1(3), *Purpose and Effect of Designating a Case for Litigation* (Aug. 11, 2004).

12 *Id*.

13 Pub. L. No. 105-206, §§ 1001(a)(4), 3401, 112 Stat. 685, 689, 746 (1998) (establishing Appeals as an independent function within the IRS, and granting taxpayers a statutory right to a hearing before Appeals in connection with liens and levies, codified at IRC §§ 6320(b)(1) (lien), 6330(b)(1) (levy)). RRA 98 § 3462 also directed the IRS to establish procedures for administrative appeals of IRS rejections of proposed installment agreements or offers-in-compromise under IRC §§ 6159 and 7122, respectively. In addition, other provisions assume that taxpayers have access to Appeals. *See, e.g.*, IRC §§ 6015(c)(4)(B)(ii)(I), 7430(c)(2), 6621(c)(2)(A)(i).

14 Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3462(c), 112 Stat. 685, 766 (1998). *See* IRC §§ 6330, 6159(e), and (f); 7122(e).

15 IRC § 6702(b)(2)(A); IRC § 7122(g); IRM 8.22.5.5.3, *Frivolous Issues* (Nov. 8, 2013).

16 Notice 2015-72, 2015-44 I.R.B. 613.

17 Letter from American Bar Association (ABA) Section of Taxation to Comm'r, IRS, Comments on Notice 2015-72 (Nov. 16, 2015), https://www.americanbar.org/groups/taxation/policy/policy_2015.html.

18 The IRS's request for comments may suggest the IRS was seeking to increase the deference given to the final rule. However, the revenue procedure did not purport to establish "legislative" rules. If it had, the IRS would have been required to consider comments and provide a concise statement explaining the basis and purpose for a final rule under 5 U.S.C. § 553(c). The rule could have been challenged on the basis that the IRS did not address the comment and provide a reasoned explanation and that it was arbitrary and capricious under 5 U.S.C. § 706(2)(A). *See, e.g.*, *Altera Corp. & Subs. v. Comm'r*, 145 T.C. 91, 130 (2015) (holding that a regulation was invalid because, in promulgating the regulation, the Treasury did not "adequately respond to commentators," citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) (requiring rules to be the product of reasoned decision-making)).

19 National Taxpayer Advocate 2013 Annual Report to Congress 5-19; National Taxpayer Advocate 2007 Annual Report to Congress 478-489; IRS News Release IR-2014-72 (June 10, 2014).

20 IRC §§ 7803(a)(3), (a)(3)(E).

in IRS Publication 1, which is a statutorily mandated publication, "Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties…"[21]

The U.S. District Court for the Northern District of California recently weighed in on the scope of taxpayers' right to an administrative appeal in *Facebook, Inc. v. IRS*.[22] That case arose out of a five-year audit of Facebook by the IRS, in which the IRS interviewed Facebook employees, issued more than 200 requests for documents, and asked it to agree to five extensions of the statutory period of limitations. When Facebook declined to extend the period for a sixth time, the IRS issued a SNOD. Facebook filed a petition to the Tax Court and asked the IRS to transfer the case to Appeals. The IRS refused based on its view that doing so was "not in the interest of sound tax administration."[23] Facebook responded by filing suit in District Court and arguing, among other things, that the IRS violated its "right to appeal a decision of the Internal Revenue Service in an independent forum," under IRC § 7803(a)(3)(E).

The U.S. District Court for the Northern District of California granted the IRS's motion to dismiss, holding that Facebook did not have an enforceable right to take its case to Appeals. The District Court reasoned that the IRS's Statement of Procedural Rules did not create enforceable rights and neither did IRC § 7803(a)(3)(E). By its terms, IRC § 7803(a)(3) required the Commissioner to train employees and ensure they act in accord with rights granted under "other provisions." Moreover, the District Court stated that even if IRC § 7803(a)(3) had created enforceable rights, it was not clear that the "right to appeal in an independent forum" refers to a right to take a case to IRS Appeals, as opposed to a federal court.[24]

REASONS FOR CHANGE

The right to appeal a decision within the IRS is an indispensable element of fair and equitable tax administration. Such is the case because an appeal represents the final administrative opportunity to resolve a case without resort to litigation. Further, the Office of Appeals is the only IRS decision-making function that attempts to act independently of other agency determinations and to provide taxpayers with an unbiased forum for negotiating case settlements.[25]

Access to Appeals is important for a variety of reasons, including Appeals' ability to:

- Accept affidavits and weigh oral testimony;
- Consider hazards of litigation; and
- Apply the *Cohan* rule as a means of negotiating a case resolution.[26]

---

21 IRS, Pub. 1, *Your Rights as a Taxpayer* (Sept. 2017); Pub. L. No. 100-647, § 6227(a), 102 Stat. 3342, 3731 (1988).

22 *Facebook, Inc. & Subs. v. IRS*, 2018-1 U.S.T.C. (CCH) ¶50,248 (N.D. Cal. 2018). For a more in-depth discussion of the *Facebook* decision, see the applicable analysis presented in the Significant Cases Summary, *infra*.

23 Rev. Proc. 2016-22, 2016-15 I.R.B. 577.

24 *But see* IRS, Pub. 1, *Your Rights as a Taxpayer* (Sept. 2017). "Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties…." This language, which was the subject of in-depth discussion between the National Taxpayer Advocate and the IRS when Pub. 1 was revised to incorporate the TBOR, explicitly contemplates that the appeal right in question is intended to exist within the IRS, not just in the judicial realm. By law, Publication 1 is required to be sent to taxpayers at various stages of an ongoing dispute.

25 TAS also acts independently, but in keeping with its origins as an ombuds function, TAS does not make substantive case decisions.

26 The *Cohan* rule was developed under federal case law as a means of allowing the fact finder to estimate deductible expenses where the fact of those expenses, although not their amount, can be substantiated. *See Cohan v. Comm'r*, 39 F.2d 540 (2d Cir. 1930).

Currently, however, the IRS has the unilateral ability to deny this forum to any taxpayer on an *ad hoc* basis. Because taxpayers lack a legally enforceable right to an appeal, they are powerless to prevent the IRS from bypassing Appeals if it wishes to punish uncooperative behavior or to avoid settlement negotiations involving a particular taxpayer or issue. This unchecked and unreviewable power raises the specter of unfair and inequitable treatment of individual taxpayers or broader taxpayer groups.

In some very limited circumstances, curtailing taxpayer access to Appeals may indeed prove warranted. However, these situations should not be left to the IRS to determine on an *ad hoc* basis. Rather, they should be clearly laid out by statute so as to protect both taxpayers and the IRS.[27]

Indeed, the IRS already has the ability to bypass Appeals in a number of situations, including when a taxpayer adopts a frivolous position or when the filing of a Collection Due Process hearing request reflects a desire to delay or impede the administration of the federal tax laws.[28] Likewise, Chief Counsel, subject to appropriate consultations and approvals, can designate broad categories of issues or cases for litigation. Accordingly, another such mechanism that is less well-defined and more open to individual discretion is not only unnecessary, but heightens risk of government overreach and jeopardizes taxpayer rights.

EXPLANATION OF RECOMMENDATIONS

The National Taxpayer Advocate recommends that Congress amend section 7803(a) to establish an independent Office of Appeals and grant taxpayers the right to a prompt administrative appeal within the IRS that provides an impartial review of all compliance actions and an explanation of the Appeals decision, except where the Secretary has determined, pursuant to regulations, that an appeal is not available, including on the basis of designation for litigation or adoption of a frivolous position. Where an appeal is not available, the Secretary shall furnish taxpayers with the procedures for protesting to the Commissioner the decision to bar an appeal in these circumstances.

This legislation would establish the presumption that taxpayers have the right to an appeal, subject only to narrowly defined and clearly articulated regulatory exceptions. Only where these exceptions exist would the IRS have the right to deny an appeal. However, the basis for such a denial must be explained to taxpayers and they would have the right to challenge this determination.

By adopting these recommendations, Congress would protect the viability of the Appeals process within the IRS. At long last, taxpayers would have a legally enforceable right to an administrative appeal, which is their last, and often best, opportunity to resolve a case within the IRS. By permitting this right to be circumscribed only when the Secretary has specified by regulations that an appeal is unavailable, Congress would ensure that any such limitations would be imposed solely when warranted and applied fairly across the overall taxpayer population.

27 For example, a reasonable case can be made in support of a statutory provision barring appeals of positions determined to be frivolous within the meaning of IRC § 6702(c). Section 11101(a) of the Taxpayer First Act, H.R. 5444, (115th Cong.) (2018) proposes a similar but less sweeping recommendation than the one put forward by the National Taxpayer Advocate. That proposed legislation would amend IRC § 7803 to provide a more generalized right of administrative appeal that could be curtailed only with appropriate notice and explanation from the IRS Commissioner. Among other things, it also would specify that the rights created by the legislation did not extend to appeals of frivolous positions.

28 IRM 8.11.8.2(1), *IRC 6702 – Frivolous Tax Submissions* (Oct. 28, 2013); IRM 8.22.5.5.3, *Frivolous Issues* (Nov. 8, 2013).

LR #3 FIX THE FLORA RULE: Give Taxpayers Who Cannot Pay the Same Access to Judicial Review as Those Who Can

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

In 1958 in *Flora I* and again in 1960 in *Flora II,* the U.S. Supreme Court held that taxpayers must fully pay a tax liability before filing a refund suit in a district court or the U.S. Court of Federal Claims (as summarized in the Appendix).[2] The Court reasoned that this full payment rule (a.k.a. the *Flora* rule) would protect the "public purse" and cited its decision in *Cheatham* that justified the rule as necessary to protect the very "existence of government."[3] In 1875 when *Cheatham* was decided, the rule may have been necessary to prevent local courts from starving the young federal government of the revenue it needed to exist. Today, the full payment rule is no longer needed to protect the existence of the government and may not even protect the public purse.

It is clear, however, that the full payment rule gives the poor who cannot pay a disputed liability less access to judicial review than wealthier taxpayers who can. Because the IRS may assess certain penalties (called "assessable penalties") before giving the taxpayer an opportunity to petition the Tax Court to review them, the rule also closes the courthouse door to those facing assessable penalties that are too large to pay—precisely the penalties that are most damaging if they are wrongly assessed.[4] Even if the IRS's liability determination is correct, a lack of due process seems unfair and may erode voluntary

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See Flora v. United States (Flora I)*, 357 U.S. 63 (1958), *reaff'd*, *Flora v. United States (Flora II)*, 362 U.S. 145 (1960). *Flora II* was a 5-4 decision with the majority acknowledging that "as we recognized in the prior opinion, the statutory language is not absolutely controlling." *Flora II*, 362 U.S. at 151.

3 *See Flora I*, 357 U.S. at 67-69 (*citing Cheatham v. United States*, 92 U.S. 85, 89 (1875), which said the very "existence of government" was at stake); *Flora II*, 362 U.S. at 175 ("the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full"). For a discussion of how Congress has increasingly provided taxpayers with procedural protections, overriding the sovereign's ancient power to require immediate payment of taxes, see Nina E. Olson, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 Tax Law. 227 (2010).

4 *See* IRC §§ 6671(a), 6212, and 6213.

compliance—a consequence which may pose a greater risk to the public purse than providing a pre-payment forum for judicial review.[5]

Moreover, the problems posed by assessable penalties have grown. When *Flora I* was decided, there were only four assessable penalties, but today there are over 50.[6] This erosion of judicial oversight is particularly inconsistent with the taxpayer's *right to appeal an IRS decision in an independent forum* and *right to a fair and just tax system*.

EXAMPLES

Example 1: The District Court and the Court of Federal Claims Cannot Review Claims from Those Who Cannot Fully Pay

In 2010, the IRS audited Ms. Jane Doe's 2007 income tax return and issued a notice of deficiency, proposing to disallow her Earned Income Tax Credit (EITC) because she had no bank account or accounting system to substantiate her earned income.[7] If given an opportunity, Ms. Doe could substantiate her income in court using the testimony of customers. Because she did not understand the notice of deficiency, Ms. Doe missed the deadline for filing a petition with the Tax Court.[8] Under the full payment rule, she cannot file suit in a district court or in the Court of Federal Claims before paying in full. Because she cannot afford to pay in full, she cannot get her case reviewed, and the IRS will attempt to collect the inaccurate deficiency.

Example 2: By the Time a Person Has Fully Paid in Installments, It May Be Too Late to Recover the Early Payments

The facts are the same as in Example 1, except that Ms. Doe entered into an installment agreement (IA) to pay the liability over a six-year period (*i.e.*, between 2010 and 2016).[9] Neither the applicable U.S. District Court nor the U.S. Court of Federal Claims had jurisdiction to review her case before she completed the IA and fully paid. After completing the IA and fully paying the liability in 2016, Ms. Doe filed a claim for refund. By 2016, she could only recover the portions she paid in the last two

5 *See*, *e.g.*, National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 1-28 (finding that trust and norms correlate with estimated tax compliance among Schedule C filers). Indeed, *Flora II* suggested that the full payment rule would promote voluntary compliance, in part, because enforced collection of a disputed liability while a case was before a district court or the Court of Federal Claims would adversely affect voluntary compliance. *Flora II* at 176 n. 43. This suggestion by *Flora II* seems to assume that the full payment rule simply shifts litigation from proceedings that do not suspend collection to the Tax Court where enforced collection is suspended. Today, however, the rule empowers the IRS to collect liabilities that are not subject to judicial review.

6 *Compare* Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730 (1954) (reflecting three assessable penalties, codified at IRC §§ 6672-6674), *as amended by* Pub. L. No. 84-466, § 3, 70 Stat. 90 (1956) (enacting a fourth, codified at IRC § 6675), *with* IRC §§ 6671-6725 (more than 50 present-day assessable penalties).

7 This hypothetical example was inspired by a recent case. *See Lopez v. Comm'r*, T.C. Summ. Op. 2017-16 (holding an unbanked taxpayer who timely petitioned the Tax Court was entitled to EITC because she substantiated her earned income in court based on the testimony of customers).

8 Low income taxpayers can easily miss filing deadlines. *See*, *e.g.*, *Mullins v. IRS*, 120 A.F.T.R.2d (RIA) 5028 (S.D. Ohio 2017) (considering an EITC claim in district court after the taxpayer missed the deadline for filing a petition with the Tax Court and paid the assessment). For example, the notice could be sent to an old address or taken by a roommate. Some taxpayers may be afraid to open a letter from the IRS. Some may not understand the IRS's letters (*e.g.*, due to literacy or language barriers). Others may mistakenly write to the IRS instead of filing a petition with the Tax Court.

9 This hypothetical example was inspired by the dissent in *Flora II*. *See Flora II*, 362 U.S. at 195-96 (J. Whittaker, dissenting) (warning that early installment payments would not be reviewable under the full payment rule). The same result could occur if instead of entering an installment agreement (IA), the IRS simply offset the taxpayer's refunds each year for six years.

years (*i.e.*, 2015 and 2016).[10] Because the full payment rule delayed her suit, it was too late to recover the payments she made during 2010-2014.[11]

Example 3: Collection Due Process Appeals Jurisdiction Does Not Solve the Problem

The facts are the same as in Example 1, except that after the IRS assessed the deficiency it filed a notice of federal tax lien (NFTL) and sent Ms. Doe a Collection Due Process (CDP) notice.[12] Ms. Doe requested a CDP hearing with the IRS's Appeals function. Appeals could not consider Ms. Doe's underlying liability at the hearing because she had received a statutory notice of deficiency.[13] Although the Tax Court has jurisdiction to review the results of a CDP hearing, it does not have jurisdiction to consider issues not properly raised and considered in the hearing.[14] Thus, it could not review the disputed liability. In addition, Ms. Doe cannot file suit in a district court or in the Court of Federal Claims because she has not fully paid the liability.

Example 4: Assessable Penalties That Are Too Large to Pay Are Not Subject to Judicial Review

An examiner erroneously proposed over $160 million in penalties against Mr. John Doe under IRC § 6707 for failure to timely register a tax shelter.[15] The IRS Office of Appeals reduced the penalty to about $65 million, which Mr. Doe still could not pay. Because IRC § 6707 is an assessable penalty, the IRS properly assessed it without sending him a notice of deficiency. A notice of deficiency would have given him the right to petition the Tax Court.[16] Because Mr. Doe cannot pay the assessment, neither a district court nor the Court of Federal Claims has jurisdiction to review it under the full payment rule. Because he was given the opportunity for an administrative appeal, the Tax Court would not have jurisdiction to review the liability in connection with a CDP hearing.[17]

---

10 A taxpayer must make an administrative claim for refund before filing suit. IRC § 7422(a). In general, any administrative claim must be made within the later of three years after the filing of the original tax return or two years of payment of the tax. IRC § 6511(a). If the claim is filed in the two-year period, the amount that can be refunded is generally limited to taxes paid within the two-year period before the claim is made. IRC § 6511(b)(2)(B).

11 We do not propose to extend the limitations period because there are good reasons for them. It makes more sense to allow a court to determine how much a person owes as quickly as possible. By the time a taxpayer has paid, witnesses are less likely to be available, memories are more likely to have faded, and relevant documentation is more likely to have been lost. For further discussion of the benefits of limitations periods, see, *e.g.*, National Taxpayer Advocate 2009 Annual Report to Congress 391-399 (Legislative Recommendation: *Provide a Fixed Statute of Limitations for U.S. Virgin Islands Taxpayers*).

12 The IRS must send a collection due process (CDP) notice after filing a Notice of Federal Tax Lien (NFTL) and before issuing a levy. *See generally*, IRC §§ 6320 (lien), 6330 (levy).

13 IRC § 6330(c)(2)(B); IRC § 6320(c). *See also* IRM 8.22.8.3 (Aug. 9, 2017).

14 *See* IRC § 6330(d)(1); Treas. Reg. §§ 301.6320-1(f)(2) Q&A F3, 301.6330-1(f)(2) Q&A F3.

15 This hypothetical example was loosely inspired by *Larson v. United States*, 888 F.3d 578 (2d Cir. 2018), *aff'g* 118 A.F.T.R.2d (RIA) 7004 (S.D.N.Y. 2016) (district court had no jurisdiction to review of assessable penalties under IRC § 6707). However, the example assumes the penalties were erroneously assessed.

16 IRC §§ 6212, 6213.

17 IRC § 6330(c)(2)(B); IRC § 6320(c); Treas. Reg. §§ 301.6320-1(e)(3)A-E2 and 301.6330–1(e)(3)A–E2. These regulations are controversial, as discussed in footnote 32, below.

RECOMMENDATIONS

A simple solution would be to repeal the full payment rule.[18] If Congress prefers a more tailored approach to improve access to judicial review, the National Taxpayer Advocate recommends Congress:

1. Amend 28 U.S.C. § 1346(a)(1) to clarify that full payment of a disputed amount is only a prerequisite for jurisdiction by district courts and the U.S. Court of Federal Claims if the taxpayer has received a notice of deficiency. If enacted, taxpayers who are subject to assessable penalties would not need to pay them in full before filing suit in a district court or the Court of Federal Claims.
2. Amend 28 U.S.C. § 1346(a)(1) to clarify that a taxpayer is treated as having fully paid a disputed amount for purposes of the full payment rule at the earlier of when the taxpayer has paid some of it (including by offset) and either (a) the IRS has classified the account as currently not collectible due to economic hardship,[19] or (b) the taxpayer has entered into an agreement to pay the liability in installments.[20] If enacted, taxpayers who cannot afford to pay would have the same access to judicial review as those who can (*i.e.*, the option to file suit in a district court or the U.S. Court of Federal Claims).
3. Amend IRC § 6214 to authorize the U.S. Tax Court to review liabilities where the taxpayer has not received a notice of deficiency (*e.g.,* assessable penalties) in a manner that parallels the deficiency process. In addition, allow the IRS to assess and collect liabilities only after any such review is complete or the period for filing a Tax Court petition has expired. Alternatively, Congress could expand the Tax Court's jurisdiction to review liabilities in connection with CDP appeals when the taxpayer has not received a notice of deficiency. These changes would authorize review of assessable penalties by the Tax Court even if the taxpayer had an opportunity for an administrative appeal.[21]

PRESENT LAW

A taxpayer may seek judicial review of an IRS liability determination in various federal courts. However, judicial review is sometimes unavailable.

Deficiency Litigation Before the Tax Court

Upon receipt of a statutory notice of deficiency from the IRS, a taxpayer generally has 90 days to file a petition with the Tax Court—the only court (other than the Bankruptcy Court) that can review

---

18 A repeal of the full payment rule would increase access to the district courts and the Court of Federal Claims. These courts have no jurisdiction if the taxpayer has petitioned the Tax Court. *See* IRC § 7422(e). Therefore, a repeal of the full payment rule would not erode judicial economy by allowing taxpayers to litigate the same issue in more than one court. Even if the full payment rule is repealed, however, Congress should consider the third recommendation—to expand the Tax Court's jurisdiction—because it's informal rules make it more accessible to unsophisticated taxpayers.

19 *See* IRC § 6343(a)(1)(D) (authority to release levies that create an economic hardship); Policy Statement 5-71, IRM 1.2.14.1.14 (Nov. 19, 1980) (establishing a policy to report accounts as currently not collectible when the taxpayer has no assets or income which are, by law, subject to levy).

20 For a similar proposal, see Carlton M. Smith, *Let the Poor Sue For Refund Without Full Payment*, 125 Tax Notes 131 (Oct. 5, 2009).

21 For a similar proposal, see Letter from Keith Fogg, Dir. Fed. Tax Clinic, Legal Svc. Ctr., Harvard L. Sch. to Hon. Lynn Jenkins, Chair, Subcomm. on Oversight of the Comm. on Ways & Means (Apr. 6, 2018) (comments on the Taxpayer First Act, proposal 2), http://procedurallytaxing.com/wp-content/uploads/2018/04/LetterandProposalsonTaxpayerFirstLegislation.pdf.

a tax deficiency before it is paid.[22] The Tax Court is particularly accessible to unsophisticated and unrepresented taxpayers because it uses informal procedures, which are even more informal if the dispute does not exceed $50,000.[23] However, confusing IRS correspondence, illiteracy, language barriers, and unequal access to competent tax professionals can cause taxpayers—particularly low income taxpayers—to miss the deadline for filing a petition with the Tax Court.[24]

The IRS can also assess certain penalties (called "assessable" penalties) without sending a notice of deficiency or otherwise triggering the Tax Court's jurisdiction.[25] The penalties in Subchapter B (*i.e.*, IRC §§ 6671-6725) are expressly excluded from the deficiency process.[26] Other penalties are implicitly excluded because they do not depend on a tax deficiency.[27] Thus, the Tax Court has no jurisdiction to review them before they are assessed.

Collection Due Process Litigation Before the Tax Court

After the IRS assesses a liability, the taxpayer may sometimes seek judicial review when the IRS tries to collect. Before the IRS levies property or after it has filed a notice of federal tax lien (NFTL), it must send a CDP notice, which gives the taxpayer the right to request a CDP hearing before the IRS's Appeals function.[28] Within 30 days of Appeals' determination, the taxpayer may petition the Tax Court for review.[29]

---

22 IRC §§ 6212, 6213. The 90-day period becomes 150 days if the notice is addressed to a person who is outside the United States. *Id*. The IRS may also assess tax without first sending a notice of deficiency if it determines that collection is in jeopardy. *See* IRC §§ 6851, 6861, 6862, 6871. This proposal would not change the existing jeopardy assessment procedures.

23 IRC § 7463.

24 *See, e.g.*, Carlton M. Smith, *Let the Poor Sue For Refund Without Full Payment*, 125 Tax Notes 131 (Oct. 5, 2009). The IRS is not required to send a notice of deficiency before summarily assessing a math or clerical error. IRC §§ 6213(b), (g). Although taxpayers who timely respond to math error notices can get the IRS to send them notices of deficiency and then file a petition with the Tax Court, low income taxpayers have difficulty understanding math error notices and timely navigating these procedures. *See, e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 163.

25 Items such as self-assessed taxes and erroneous tax pre-payment credit claims may be assessed without the opportunity for review by the Tax Court because they are not "deficiencies." *See* IRC § 6201.

26 *See* IRC § 6671(a) ("The penalties and liabilities provided by this subchapter [IRC §§ 6671-6725] shall be paid upon notice and demand by the Secretary…"); *Smith v. Comm'r*, 133 T.C. 424, 428 n.3 (2009) (indicating the following penalties are expressly excluded from deficiency procedures: IRC §§ 6677(e) (failure to file information with respect to foreign trust), 6679(b) (failure to file returns, etc., with respect to foreign corporations or foreign partnerships), 6682(c) (false information with respect to withholding), 6693(d) (failure to provide reports on certain tax-favored accounts or annuities), 6696(b) (rules applicable with respect to IRC §§ 6694, 6695, and 6695A), 6697(c) (assessable penalties with respect to liability for tax of regulated investment companies), 6706(c) (original issue discount information requirements), 6713(c) (disclosure or use of information by preparers of returns), 6716(e) (failure to file information with respect to certain transfers at death and gifts)).

27 *See Smith v. Comm'r*, 133 T.C. at 429 n.4 (indicating the following penalties are implicitly excluded from the deficiency process: IRC §§ 6651 (failure to file a tax return or to pay a tax; the deficiency procedures apply only to the portion of the penalty attributable to the deficiency in taxes), 6677 (failure to file information returns with respect to certain foreign trusts), 6679 (failure to file returns, *etc*., with respect to foreign corporations or foreign partnerships), 6686 (failure to file returns or supply information by domestic international sales corporation or foreign sales corporation), 6688 (assessable penalties with respect to information required to be furnished under sec. 7654), 6690 (fraudulent statement or failure to furnish statement to plan participant), 6692 (failure to file actuarial report), 6707 (failure to furnish information regarding reportable transactions), 6708 (failure to maintain lists of advisees with respect to reportable transactions), 6710 (failure to disclose that contributions are nondeductible), 6711 (failure by tax-exempt organization to disclose that certain information or services are available from the Federal Government), 6712 (failure to disclose treaty-based return positions), and 6707A (failure to include reportable transaction information with return)).

28 *See generally*, IRC §§ 6320 (lien), 6330 (levy).

29 IRC § 6330(d)(1).

Although the Tax Court has jurisdiction to consider certain challenges to the underlying liability that were properly raised during the CDP hearing,[30] it generally does not have jurisdiction to review assessable penalties or to determine that a taxpayer has an overpayment.[31] A taxpayer cannot challenge the underlying liability if he or she (1) received a statutory notice of deficiency, or (2) otherwise had an opportunity to dispute the liability, which the IRS interprets by regulation to include "a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability."[32] Thus, CDP does not provide an avenue for judicial review of assessments against taxpayers who are subject to assessable penalties that they could have elevated to Appeals.[33]

Refund Litigation Before a District Court or the Court of Federal Claims

After the taxpayer pays a liability, a district court or the Court of Federal Claims may have jurisdiction to review the taxpayer's claim for refund.[34] However, these suits are subject to limitations.

Complicated Rules Limit the Timing of Claims and the Amounts That Can Be Refunded

Before filing a refund suit, the taxpayer must make a timely administrative claim.[35] To be timely, the administrative claim generally must be within the later of (i) three years from when the original return was filed or (ii) two years from when the tax was paid.[36] If the taxpayer can make a claim, the amount he or she can recover is limited based on when the claim is filed. If the claim is filed within the three-year period (*i.e.*, (i) above), the taxpayer can only recover amounts paid within three years, plus any

---

30 *See* Treas. Reg. §§ 301.6320-1(f)(2)A-F3; 301.6330-1(f)(2)A-F3.

31 See, *e.g.*, *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006) (holding the Tax Court lacked jurisdiction to consider overpayment); *McLane v. Commissioner*, T.C. Memo. 2018-149 (same). For a legislative recommendation to address this problem, see National Taxpayer Advocate 2017 Annual Report to Congress 293-298 (Legislative Recommendation: *Amend IRC § 6330 to Allow the Tax Court Jurisdiction to Determine Overpayments*). For a long history of proposals to expand the Tax Court's refund jurisdiction, see Harold Dubroff & Brant J. Hellwig, The United States Tax Court, An Historical Analysis 315-322 (2d Ed. 2014), https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf.

32 IRC § 6330(c)(2)(B); § 6330(c)(4)(A); Treas. Reg. §§ 301.6320-1(e)(3)A-E2 and 301.6330–1(e)(3)A–E2; IRM 8.22.8.3 (Aug. 9, 2017). *See also Our Country Home Enterprises, Inc. v. Comm'r*, 855 F.3d 773 (7th Cir. 2017); *Keller Tank Services II, Inc. v. Comm'r*, 854 F.3d 1178 (10th Cir. 2017); *Iames v. Comm'r*, 850 F.3d 160 (4th Cir. 2017), and *Lewis v. Comm'r*, 128 T.C. 48 (2007). Some have argued that these cases, which uphold the regulations, misinterpret the statute. *See, e.g.*, Chaim Gordon, *The Disjunctive Test for Challenging a Liability in a CDP Hearing*, 159 Tax Notes 1615 (Jun. 11, 2018). In CDP cases involving assessable penalties where the IRS has denied access to Appeals, however, the Tax Court may have jurisdiction. *See, e.g.*, *Yari v. Comm'r*, 143 T.C. 157 (2014), *aff'd*, 669 Fed. Appx. 489 (9th Cir. 2016) (claiming jurisdiction to review an assessable penalty under IRC § 6707A). Because the IRS does not view the receipt of a math error notice as a "prior opportunity" to dispute a liability, taxpayers may also obtain judicial review of math or clerical errors in the context of a CDP appeal. *See* IRM 8.22.8.3(9)(f) (Aug. 9, 2017).

33 IRC § 6330(c)(4)(A)(ii). Notably, if taxpayers were entitled to a pre-deprivation hearing under the Due Process Clause, commentators have suggested that CDP hearings do not provide sufficient protections. *See, e.g.*, Diane Fahey, *The Tax Court's Jurisdiction over Due Process Collection Appeals: Is It Constitutional*, 55 Baylor L. Rev. 453, 457 (2003) (pointing out that the taxpayer does not have the right to subpoena witnesses or records, the CDP hearing is not conducted by an independent adjudicator, and the only record of what transpired is the determination letter prepared by the appeals officer afterwards). Others have suggested that Appeals could be more independent. *See, e.g.*, American Bar Association, *Section of Taxation, Comments on Recent Practice Changes at Appeals* (May 9, 2017), https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/050917comments.pdf.

34 *See* 28 U.S.C. §§ 1346(a)(1), 1491.

35 IRC § 7422(a). The IRS must use deficiency procedures to disallow all or part of the EITC on original returns, but may use math error procedures in the case of errors on returns that are mathematical or clerical within the meaning of IRC § 6213(g)(2). The IRS also generally uses deficiency or math error procedures (rather than a notice of claim disallowance) to disallow other refundable credits on original returns. *See, e.g.*, PMTA 2007-0791 (May 2, 2016), and CCA 200202069 (Nov. 30, 2001).

36 IRC § 6511(a). If no return was filed, the limitations period is two years from when the tax was paid.

extension to file, before the date of the claim.[37] Otherwise, the taxpayer can only recover amounts paid within two years before the date of the claim.[38]

Following the administrative claim, the taxpayer can only file suit within a specific period and under certain conditions. The taxpayer cannot file suit before the earlier of when (1) the IRS disallows the claim, or (2) six months have lapsed and the IRS has not responded.[39] The taxpayer also generally cannot file suit later than two years after the IRS mails the notice of claims disallowance.[40]

The Full Payment Rule Bars Access by Those Who Cannot Pay

The full payment rule was established by the Supreme Court in *Flora I* and *II*, as described in the Appendix. It requires a taxpayer to pay an assessment in full before it can be challenged in a refund suit filed in a district court or the Court of Federal Claims. It may also require taxpayers to fully pay the penalties and interest if any dispute about these items would not be determined by the court's resolution of the underlying tax claim.[41]

Exceptions to the full payment rule

There are limited exceptions to the full payment rule. For "divisible" taxes, where the assessment may be divisible into a tax on each transaction or event (*e.g.*, excise taxes), the taxpayer need only pay enough to cover a single transaction or event.[42] For example, the trust fund recovery penalty under IRC § 6672(a)—a collection device that makes all "responsible persons" jointly and severally liable for a business's trust fund taxes—is a divisible tax. After the IRS assesses the penalty, the responsible person need only pay the amount due with respect to a single employee for a single quarter before filing a suit that will determine his or her overall liability for the trust fund recovery penalty.[43] In such cases, the government may, but is generally not required, to file a counterclaim for the unpaid amounts that involve the same or similar issue (*e.g.*, taxes for other employees), even if they relate to different periods.[44]

There are also several statutory exceptions to the full payment rule. For example, in 1998 Congress clarified that suits by estates would not be barred solely because the executor had elected to pay the

---

37 IRC § 6511(b)(2)(A).

38 IRC § 6511(b)(2)(B).

39 IRC § 6532(a)(1); 28 U.S.C. § 1346(a)(1) (granting jurisdiction).

40 IRC § 6532(a)(1).

41 *See Shore v. United States*, 9 F.3d 1524 (Fed. Cir. 1993), *rev'g* 26 Cl. Ct. 829, 830 (1992). Immediately after *Flora II*, however, this point was unsettled. *See, e.g.*, Erika L. Robinson, *Refund Suits in Claims Court: Jurisdiction and the Flora Full-Payment Rule After Shore v. United States*, 46 Tax Law. 827, 831-34 (1993) (describing four different views of the issue announced within a two-year period by the Claims Court); Martin M. Lore & L. Paige Marvel, *Claims Court Does About Face on Flora Full-Payment Rule*, 78 J. Tax'n 81, 81 (1993) (same).

42 *Flora II*, 362 U.S. at 175 n.38 (1960).

43 *See, e.g.*, *Steele v. United States*, 280 F.2d 89 (8th Cir. 1960) (penalties under IRC § 6672 for failure to remit amounts withheld from employees' wages are divisible employee by employee). Similarly, the tax return preparer penalty under IRC § 6695 is divisible. *See Nordbrock v. United States*, 173 F.Supp.2d 959 (D. Ariz. 2000), *aff'd*, 248 F.3d 1172. (9th Cir. 2001).

44 *See* Fed. R. Civ. P. 13(a) (generally requiring any counterclaim that arises from "transaction or occurrence that is the subject matter of the opposing party's claim" provided the counterclaim(s) "do not require adding another party over whom the court cannot acquire jurisdiction"); Ct. Fed. Cl. R. 13(a) (same); *Flora II*, 362 U.S. at 166 ("the Government may but seemingly is not required to bring a counterclaim"). The government generally makes permissive counterclaims for unpaid portions of divisible taxes. *See* Chief Counsel Directives Manual (CCDM) 34.5.1.1.2.5 (Aug. 11, 2004). Counterclaims by the government for unpaid taxes help ensure the collections period under IRC § 6502(a) does not expire with respect to the unpaid amounts while refund litigation is pending with respect to the amounts that have been paid. *Id.*

estate tax in installments under IRC § 6166, and thus, had not fully paid.[45] In addition, in 1976 when Congress established assessable preparer penalties under IRC § 6694, it specifically provided that the preparer could contest them in district court after paying just 15 percent.[46] Congress took the same approach in 1982 when it established assessable penalties under IRC § 6700 (promoting abusive tax shelters) and § 6701 (aiding and abetting understatements).[47] As discussed below, however, no exception currently applies to most other assessable penalties—penalties assessed without providing the taxpayer a statutory notice of deficiency.[48]

The IRS May Sometimes Continue Collecting Disputed Amounts

Although the IRS is not authorized to assess or collect amounts in dispute before the Tax Court, the filing of a suit in a district court or the Court of Federal Claims does not automatically stop IRS assessment or collection activity.[49] Because the filing of a suit to recover a divisible portion of a liability did not prevent the IRS from collecting the remainder, in 1978, Congress provided that taxpayers could avoid collection of the remainder (*e.g.*, through the filing of a NFTL) by posting a bond.[50] Similarly, in 1998, Congress provided that the IRS can not levy to collect unpaid portions of divisible taxes while the taxpayer is contesting a divisible portion, provided the proceeding will determine his or her liability for the unpaid portion by reason of *res judicata* or *collateral estoppel*.[51] For matters not covered by this exception, even if a taxpayer manages to get an unpaid dispute before the court (*e.g.*, if the IRS sues to collect), the IRS may continue collection activity while the dispute is pending.[52]

---

45 Internal Revenue Service Restructuring and Reform Act (RRA 98), Pub. L. No. 105-206, § 3104(a), 112 Stat. 685, 731-32 (1998) (codified at IRC § 7422(j)).

46 Tax Reform Act, Pub. L. No. 94-455, § 1203(b)(1), 90 Stat. 1520, 1689 (1976) (codified at IRC § 6694(c)). This provision also prevents the IRS from collecting the unpaid portion of the penalty while a suit to determine the penalty is pending. IRC § 6694(c)(1).

47 Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 322(a), 96 Stat. 324, 612 (1982) (codified at IRC § 6703(c)).

48 Indeed, a court recently used the statutory exceptions to the full payment rule as a reason to hold that the full payment rule applied to penalties under IRC § 6707 for which Congress had not enacted an exception. *See Larson v. United States*, 888 F.3d 578 (2d Cir. 2018), *aff'g* 118 A.F.T.R.2d (RIA) 7004 (S.D.N.Y. 2016). *See also Diversified Grp., Inc. v. United States*, 841 F.3d 975 (Fed. Cir. 2016).

49 *Compare* IRC § 7421 (Anti-Injunction Act, prohibiting suits to restrain assessment or collection), *with* IRC § 6213(a) (providing an exception to the anti-injunction act for the Tax Court). Indeed, the petitioner in *Flora* had argued that Congress established the Tax Court to enable taxpayers to prevent the Government from collecting taxes while disputing a liability. *Flora II*, 362 U.S. at 638.

50 Pub. L. No. 95-628, § 9(a), 92 Stat. 3627, 3633 (1978) (codified at IRC § 6672(c)); Joint Committee on Taxation (JCT), JCS-22-77, *Description of H.R. 7320; Miscellaneous Revisions Relating to Various Timing Requirements Under the Internal Revenue Code* 9-10 (May 23, 1977) (explaining "[t]hese collection proceedings and the imposition of a lien against that person's property may seriously endanger the business or credit of the person against whom the penalty was assessed.").

51 RRA 98, Pub. L. No. 105-206 § 3433, 112 Stat. 685, 759 (1998) (codified at IRC § 6331(i)).

52 In some cases, the IRS may initiate a collection suit that may give the taxpayer an opportunity to dispute the assessment. *See*, *e.g.*, IRC § 7403(c) (granting jurisdiction for district courts to "finally determine the merits of all claims to and liens upon the property" subject to a lien in a suit to foreclose); *United States v. Maris*, *et al*., 2015-1 U.S. Tax Cas. (CCH) 50,183 (D. Nev. 2015) (denying the government's motion to reduce an income tax assessment to a judgement because of questions about the validity of the assessment). However, the taxpayer does not control the timing of these suits and has no right to them. Moreover, the IRS generally does not need to file suit to levy or seize property. *See*, *e.g.*, IRC § 6331.

Bankruptcy Proceedings Before a Bankruptcy Court

A bankruptcy court "may" review certain tax liabilities, including unpaid assessable penalties that have not been contested and adjudicated in another tribunal.[53] However, the court's authority to determine a refund is limited, and the court may abstain from determining tax issues for various reasons.[54] For example, it is likely to abstain where the debtor is the only party who would benefit from the review (*i.e.*, the creditors would not benefit).[55] Ironically, the taxpayer is most likely to want judicial review of the assessment in these types of situations. Thus, a taxpayer may not be able to obtain judicial review of tax liabilities and penalties by a bankruptcy court. Moreover, if the tax assessment prompted the bankruptcy, then any such review might be conducted after the liabilities are assessed.

REASONS FOR CHANGE

The Full Payment Rule May Force Taxpayers into Bankruptcy

Congress established the Board of Tax Appeals (a predecessor of the Tax Court) in 1924, in part, because it determined that taxpayers who are faced with incorrect assessments should not have to declare bankruptcy to obtain judicial review. The House report explained that "[t]he right of appeal after payment of the tax is an incomplete remedy, and does little to remove the hardship occasioned by an incorrect assessment… [which] sometimes forces taxpayers into bankruptcy…." [56] Because the same concerns exist today, taxpayers who cannot pay should be able to obtain judicial review without declaring bankruptcy.[57]

The Full Payment Rule Discriminates Against Those Who Cannot Pay

Supreme Court Justice Whittaker's dissent in *Flora II* explained how the full payment rule discriminates against taxpayers who cannot pay, as follows:

> Where a taxpayer has paid … a part only of an illegal assessment and is unable to pay the balance within the two-year period of limitations, he would be deprived of any means of establishing the invalidity of the assessment and of recovering the amount illegally collected from him, unless it be held, … that full payment is not a condition upon the jurisdiction of District Courts to entertain suits for refund. Likewise, taxpayers who pay assessments in

53 *See* 11 U.S.C. § 505(a)(1) (bankruptcy courts "may" review the "amount or legality of any tax, any fine or penalty relating to a tax, or any addition to tax, whether or not previously assessed, whether or not paid…"); 11 U.S.C. § 505(a)(2)(A) (barring review "if such amount or legality was contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction before the commencement of the case under this title"); *In re Wyly*, 552 B.R. 338 (N.D. Tex. 2016) (reviewing unpaid assessable penalties under IRC §§ 6038(c)(4)(B) and 6677(d)).

54 *See*, *e.g.*, *In re Luongo*, 259 F.3d 323, 330 (5th Cir. 2001).

55 *See*, *e.g.*, *In re New Haven Projects Ltd. Liab. Co.*, 225 F.3d 283, 289 (2d Cir. 2000) (affirming abstention in Title 11 because "the amount of unsecured debt was "*de minimis*….[and review of the tax issue] would only benefit the Debtor and [its] affiliates…"); *In re Hinsley*, 69 F. App'x 658 (5th Cir. 2003) (unpublished) (reversing the district court's decision not to abstain because "the only parties likely to benefit from the resolution of a debtor's dispute with the taxing authority are the debtor and his lienholder on property that is not a part of the estate"); *In re Perry*, 113 A.F.T.R.2d (RIA) 1370 (M.D. Ala. 2014) (abstaining because "the remaining issues concerning the extent of the liability of the debtor to the IRS and the determination of the extent of the tax lien do not affect the unsecured creditors…"); *In re Dees*, 369 B.R. 676, 680 (N.D. Fla. 2007) ("many courts have concluded that abstention is generally appropriate in no-asset Chapter 7 cases since the distribution to creditors is not affected.").

56 H.R. Rep. No. 68-179, 7 (1924) (quoted by *Flora II*, 362 U.S. at 159); Revenue Act of 1924, 43 Stat. 253, 297-336 (1924) (establishing the Board of Tax Appeals).

57 As noted above, however, even bankruptcy may not provide an opportunity for judicial review of a tax dispute because a bankruptcy court is likely to abstain if the outcome would not affect the taxpayer's other creditors.

> installments would be without remedy to recover early installments that were wrongfully collected should the period of limitations run before the last installment is paid.[58]

This policy concern is as true today as it was in 1960. Taxpayers should not be left without a remedy just because they cannot afford to fully pay an illegal assessment quickly.

Even when taxpayers who cannot afford to pay receive notices of deficiency, which grant access to the Tax Court, the full payment rule discriminates against them by limiting their choice of forum. The choice of forum can be a tactical decision. For example, a person filing in district court may be entitled to a trial by jury, whereas no jury trial is available in the Tax Court or the Court of Federal Claims.[59] Decisions by the Court of Federal Claims are appealable to the Court of Appeals for the Federal Circuit, whereas decisions by the Tax Court and the district courts are appealable to other circuit courts.[60] Considerations about whether to pay the disputed liability and claim overpayment interest or risk liability for underpayment interest may also come into play.[61] Although low income taxpayers may not be able to afford representation in more formal proceedings, *pro bono* representation may be available.[62] Moreover, there does not appear to be a good reason to give a choice of forum only to wealthy taxpayers and those with small assessments that they can pay.

58 *Flora II*, 362 U.S. at 195-96 (J. Whittaker, dissenting).

59 *See*, *e.g.*, 28 U.S.C. § 2402 (jury trials in district courts); *Statland v. United States*, 178 F.3d 465 (7th Cir.1999) (no right to jury trial in Tax Court or Court of Federal Claims).

60 IRC § 7482; 28 U.S.C. §§ 1291-1295.

61 *See*, *e.g.*, IRC § 6621(a) (underpayment and overpayment interest). In general, the government charges interest on underpayments and pays interest on overpayments at the same rate, however, it pays less interest on corporate overpayments than it charges on corporate underpayments. *Id*. Taxpayers who are able to pay can chose whether they would prefer to pay first and potentially earn overpayment interest, or litigate first and potentially owe underpayment interest.

62 *See* IRC § 7526 (authorizing grants to low income taxpayer clinics (LITCs)). In 2017, LITCs and their volunteers represented low income taxpayers (and appeared) in 1,013 cases before the Tax Court and in 41 cases in other Federal courts. TAS analysis of Form 13424K for grant year 2017 (Sept. 6, 2018); National Taxpayer Advocate, *Low Income Taxpayer Clinic Program Celebrates 20th Anniversary*, NTA Blog (Aug. 1, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-low-income-taxpayer-clinic-program-celebrates-20th-anniversary.

Pre-payment Review Poses No Risk to the Existence of Government

In *Flora I*, the Supreme Court justified the harsh results of the full payment rule by citing *Cheatham* and other cases from the 1800s.[63] Decided in 1875, *Cheatham* explained:

> If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very **existence of the government** might be placed in the power of a hostile judiciary. (Emphasis added.)[64]

These may have been legitimate concerns in the 1800s. In the 1700s, the perception that sympathetic local juries in America were refusing to be impartial in customs disputes led the British Parliament to shift all types of revenue litigation to courts sitting without juries.[65] In the absence of a full payment rule, taxpayers could have used the same tactic of filing suits in district courts before sympathetic local juries against the federal government. This threat was exacerbated by the economic state of the federal and state governments at the time. Indeed, in 1790, the federal government had defaulted on its debt obligations, and between 1873 and 1884, ten states had too.[66] In 1880, a taxpayer tried to use this very tactic—the taxpayer waited for the government to sue to collect, then asked the district court judge to instruct the jury to decide if the tax was constitutional. Afterward, the taxpayer appealed the decision to the Supreme Court.[67] This was not a frivolous argument because a few years later, in 1895, the Supreme Court held that portions of the income tax were unconstitutional.[68] Thus, there was at least a possibility that local courts could be used to choke off federal revenue.

This risk was higher in the 1800s because the tax base was narrow, with most revenues coming from high income individuals and businesses. Before 1942, the government collected more in excise taxes

63 *Flora I*, 357 U.S. at 68 ("It is essential to the honor and orderly conduct of the government that its taxes should be promptly paid," *quoting Cheatham v. United States*, 92 U.S. 85 (1875)). Although *Flora* did not repeat the "existence of government" rationale, *Cheatham* is mentioned seven times in *Flora I* and 20 times in *Flora II*. For a discussion of how Congress has increasingly provided taxpayers with procedural protections, overriding the sovereign's ancient power to require immediate payment of taxes, see Nina E. Olson, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 Tax Law. 227 (2010).

64 *Cheatham v. United States*, 92 U.S. 85, 89 (1875). *See also*, *Springer v. United States*, 102 U.S. 586, 594 (1880) ("The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government."). Once the "government existence" rationale had been expressed in *Cheatham*, similar reasons were recited in other cases without further examination. *See, e.g.*, *Phillips v. Comm'r*, 283 U.S. 589, 595 (1931) ("Property rights must yield provisionally to governmental need." *Citing Cheatham*); *Bull v. United States*, 295 U.S. 247, 259-60 (1935) ("taxes are the life-blood of government, and their prompt and certain availability an imperious need. Time out of mind, therefore, the sovereign has resorted to more drastic means of collection…). For a discussion of Congress's decision to expand procedural protections notwithstanding these ancient cases, see Nina E. Olson, 2010 Erwin N. Griswold Lecture Before the American College of Tax Counsel, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 Tax Law. 227 (2010). For a discussion of the historical basis for similar concerns which lead to the Anti-Injunction Act and how they have abated, see Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683, 1719-1725 (2017).

65 *See United States v. Stein*, 881 F.3d 853, 859-860 (2018) (J. Pryor concurring).

66 *See* Carmen M. Reinhart, *This Time Is Different Chartbook: Country Histories on Debt, Default, and Financial Crises* 116 Nat'l Bureau Econ. Res. (NBER), Working Paper No. 15815 (Mar. 2010), http://www.nber.org/papers/w15815 (figure 66a). The federal government had another technical default after 1933 when Congress passed a resolution indicating it would not honor the "gold clause" in its bonds, which provided for repayment in gold. *Id.*; House Joint Resolution 192 (June 5, 1933). Although the Supreme Court held the government's actions were unlawful, it did not provide a remedy because it could not quantify the damages. *See Perry v. United States*, 294 U.S. 330 (1935).

67 *See Springer v. United States*, 102 U.S. 586 (1880).

68 *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) (holding that income taxes on rent, interest and dividends were unconstitutional direct taxes because they were not apportioned among the states in accordance with the population).

than in either individual or corporate income taxes,[69] and in 1895, only the rich paid income taxes, as those with less than $4,000 (over $103,000 in today's dollars) in income were exempt.[70] Moreover, there was no broad-based wage withholding or similar pre-payment requirement.[71] Because there were fewer taxpayers, if a significant number filed suit before paying in local courts with local juries, they might have been able to threaten the federal government's very existence.

These historical concerns have subsided because: (1) the 16th Amendment was ratified in 1913, settling questions about the constitutionality of the income tax; (2) Congress increasingly delegated authority to Treasury to issue debt without specific authorization between 1917 and 1939, easing liquidity concerns;[72] (3) the federal government abandoned the gold standard in 1933 so that it could devalue the currency and pay its debts by printing money;[73] and (4) Congress substantially broadened the tax base in 1942, as shown in Figure 2.3.1, and adopted pre-payment mechanisms reducing its dependence on a relatively small number of taxpayers who might sue instead of paying.[74]

69 *See* Office of Management and Budget (OMB), *Historical Tables* (Table 2.2 - Percentage Composition of Receipts by Source: 1934-2023), https://www.whitehouse.gov/omb/historical-tables/.

70 *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 444 (1895) ("The rate of taxation upon corporations and associations is in excess of the rate imposed upon individuals and associations. Persons having incomes of $4,000 or under pay nothing; corporations having like incomes pay two per cent. Persons having incomes of over $4,000 pay on the excess."). According to the inflation calculator at the Bureau of Labor Statistics (BLS) $4,000 in 1913 (the earliest period available) would be worth $103,036 as of September 2018. BLS, *CPI Inflation Calculator*, https://data.bls.gov/cgi-bin/cpicalc.pl. For a detailed discussion of the transformation of the income tax from a class tax to a mass tax and the automation that went along with it, see National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 1-62 (Study: *From Tax Collector to Fiscal Automaton: Demographic History of Federal Income Tax Administration, 1913-2011*).

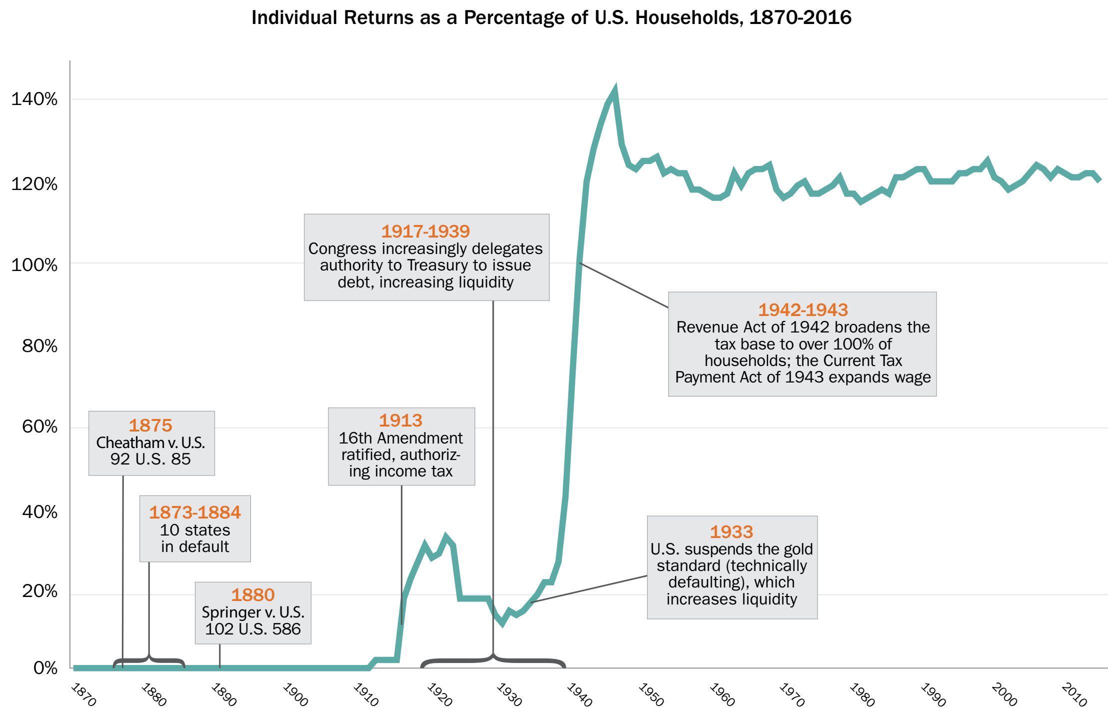
71 Revenue Act of 1942, ch 619, § 172, 56 Stat. 798, 887-92 (1942) (adopting wage withholding for a "Victory" tax); Current Tax Payment Act of 1943, ch. 120, § 2, 57 Stat. 126, 128 (1943) (expanding wage withholding to the income tax). For a detailed discussion of this evolution see, *e.g.*, Anuj C. Desai, *What a History of Tax Withholding Tells Us About the Relationship Between Statutes and Constitutional Law*, 108 Nw. U. L. Rev. 859, 896-902 (2014); Carolyn C. Jones, *Class Tax to Mass Tax: The Role of Propaganda in the Expansion of the Income Tax During World War II*, 37 Buff. L. Rev. 685, 695-699 (1989); Kristin E. Hickman & Gerald Kerska, *Restoring the Lost Anti-Injunction Act*, 103 Va. L. Rev. 1683 (2017).

72 *See*, *e.g.*, George Hall & Thomas Sargent, *Brief History of US Debt Limits Before 1939*, 115 PNAS 2942-45 (Mar. 20, 2018), http://www.pnas.org/content/115/12/2942. Before 1917, each bond issuance had to be approved by Congress.

73 House Joint Resolution 192 (June 5, 1933).

74 Revenue Act of 1942, ch. 619, 56 Stat. 798 (1942). IRS, *Historical Fact Book, A Chronology 1646-1992*, 136 (1997) (noting the Revenue Act of 1942 "broadened the tax base by over 100%"); IRS, Pub. 447, *A History of the Internal Revenue Service, Income Taxes, 1862-1962*, 23 (1962) ("Taxpayers with income under $5,000 accounted for only 10 percent of the revenue collected in 1939. By 1948, these taxpayers accounted for over 50 percent of revenue collected. In 1939, 700,000 returns accounted for 90 percent of the total tax liability. By 1948, this number had climbed to 25 million returns."). *See also* National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 45 (Study: *From Tax Collector to Fiscal Automaton: Demographic History of Federal Income Tax Administration, 1913-2011*) (concluding "[I]n the first quarter-century, income tax was a concern largely to wealthy, white businessmen, doctors, and lawyers, who dealt with their Collectors, who in turn were locally prominent political appointees. All this changed during the second phase, when the exigency of World War II transformed the income tax into a mass revenue generator…").

FIGURE 2.3.1, The Risks to the Existence of Government Declined as It Broadened the Tax Base[75]



Congress must have deemed the risk of pre-payment review (at least in the absence of a local jury) to be minimal by 1924 when it established the Board of Tax Appeals (BTA) (*i.e.*, the predecessor of the Tax Court) as a pre-payment forum to hear most tax disputes—or at the latest by 1969 when it established the Tax Court as an Article I court, independent from the executive branch.[76] In 1998, when Congress established the right to a CDP hearing, it increased access to pre-payment judicial review by the Tax Court.[77] Thus, Congress must not have been concerned that increasing pre-payment review by the Tax Court could threaten the existence of government.

75 TAS analysis of data from the IRS Statistics of Income Division, the U.S. Bureau of the Census, and the Federal Reserve Bank of St. Louis (June 2018) (on file with TAS). The number of tax returns exceeds the number of households because more than one return can be filed by people living in a single Census-defined household. U.S. Census, Glossary, https://www.census.gov/glossary/#term (last visited, Oct. 31, 2018) (defining a household). For example, adult children and extended family may file separate returns but live in the same Census-defined household.

76 Revenue Act of 1924, 43 Stat. 253, 297-336 (1924) (establishing the BTA). Before 1969, the Tax Court was an executive branch agency. Tax Reform Act of 1969, Pub. L. No. 91-172, § 951, 83 Stat. 487, 730 (codified as IRC § 7441). While reciting concerns about dollars at stake in various courts, the *Flora* decisions were primarily based on decisions by prior courts and the assumptions of prior Congresses that full payment was required. *See Flora I*, 357 U.S. at 69 (“there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due”); *Flora II*, 362 U.S. at 167 (acknowledging that such cases existed, but stating “[i]f we were to overturn the assumption upon which Congress has acted, we would generate upon a broad scale the very problems Congress believed it had solved” and citing legislative history that characterized the full payment rule as present law).

77 RRA 98, Pub. L. No. 105-206 § 3401, 112 Stat. 685, 747 (1998) (codified at IRC §§ 6320 and 6330).

Similarly, legislation to eliminate any remaining gaps in this broad access to pre-payment judicial review would not pose a threat to the existence of the government. Moreover, the existence of the government has never depended on the swift collection of penalties.

In *Flora II*, the Supreme Court acknowledged that judicial precedent for the full payment rule was mixed, but its main policy justification for the rule was that allowing taxpayers to litigate in a pre-payment forum would pose risks to the "public purse."[78] The Court also worried about Tax Court cases flooding the district courts with frivolous claims by those hoping to settle for pennies on the dollar.[79] Judicial review of frivolous claims can help taxpayers to feel they have been heard and give a court the opportunity to clarify both substantive and procedural issues. However, the Court's concerns about them are now addressed by the penalties for frivolous submissions and refund claims.[80]

In addition, the Court assumed that the full payment rule would not result in hardship because taxpayers could "appeal the deficiency to the Tax Court without paying a cent."[81] To the extent it could result in a hardship, the Court suggested it was "a matter for Congress," inviting legislation to fill in those gaps.[82]

The Full Payment Rule Applies to More Penalties Today

The gaps in pre-payment judicial review have grown. When *Flora II* was decided in 1960, there were only four assessable penalties, two of which were divisible: (1) the trust fund recovery penalty (IRC § 6672), which is divisible (as noted above), (2) the penalty for delaying Tax Court proceedings (IRC § 6673), (3) the penalty for furnishing a fraudulent statement to employees (IRC § 6674), and (4) the penalty for excessive fuel tax refund claims (IRC § 6675), which is also divisible.[83] Today, by contrast, Subchapter B of Chapter 68 contains over 50 different assessable penalties (*i.e.*, the penalties

78 *Flora II*, 362 U.S. at 175 ("the Government has a substantial interest in protecting the public purse, an interest which would be substantially impaired if a taxpayer could sue in a District Court without paying his tax in full").

79 *Flora II*, 362 U.S. at 646-47 n.41. Indeed, after the Tax Court was granted jurisdiction in CDP appeals, the IRS reported that a small percentage of CDP litigants brought frivolous cases that drained a disproportionate amount of resources. *See* Joint Committee on Taxation (JCT), JCX-53-03, *Report of the JCT Relating to the Internal Revenue Service as Required by the IRS Reform and Restructuring Act of 1998* Appendix at 22 (May 20, 2003) (IRS letter to JCT) ("About 5% or 906 cases involve frivolous issue taxpayers. However … [f]rivolous claims occupy a disproportionate share of time over claims from taxpayers having substantive issues."). However, even some frivolous CDP cases have shed light on substantive and procedural issues. *See*, *e.g.*, *Ryskamp v. Comm'r*, 797 F.3d 1142 (D.C. Cir. 2015).

80 *See*, *e.g.*, IRC §§ 6702 ($5,000 penalty for frivolous submissions to the IRS, including requests for a CDP hearing); 6673 (authorizing sanctions and costs for frivolous submissions to a court); 7482 (same); Rule 5(c), Federal Rules of Civil Procedure (same); IRC § 6676 (penalty for excessive refund claims).

81 *Flora II*, 362 U.S. at 175. Indeed, the Supreme Court observed that "[t]he Board of Tax Appeals [the predecessor of the Tax Court] … was created by Congress to provide taxpayers an opportunity to secure an independent review of the Commissioner of Internal Revenue's determination of additional income and estate taxes by the Board in advance of their paying the tax found by the Commissioner to be due. Before the act of 1924 the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment." *Flora I*, 357 U.S. at 74 n. 20.

82 *Flora I*, 357 U.S. at 76.

83 Internal Revenue Code of 1954, Pub. L. No. 83-591, 68 Stat. 730, 828 (1954). The assessable penalty for excessive claims with respect to gasoline was enacted in 1956. Pub. L. No. 84-466, § 3, 70 Stat. 87, 90 (1956) (codified at IRC § 6675). The penalty for excessive fuel tax refund claims is divisible because it applies to each refund claim. Although there is no direct authority for this conclusion, it seems consistent with *Flora II* and the methodology employed by attorneys at the IRS for identifying divisible penalties. *See*, *e.g.*, *Flora II*, 362 U.S. 171, n.37 ("excise tax deficiencies may be divisible into a tax on each transaction or event."). *See also* CCA 201315017 (2013) (concluding that the penalty for failure to file certain information returns or payee statement was divisible).

between IRC §§ 6671 and 6725).[84] As the number of assessable penalties has risen, the fact that they cannot be contested in court before they are assessed and fully paid has become increasingly problematic.[85]

Procedural Barriers Can Cause Low Income Taxpayers to Miss the Opportunity to Petition the Tax Court

Before making an audit assessment, the IRS is generally required to send the taxpayer a notice of deficiency, which gives the taxpayer 90 days to petition the Tax Court.[86] It would be easier for low income taxpayers to understand these notices and how best to respond if someone explained them in person or by phone. However, the IRS generally audits low income and middle income taxpayers by correspondence or by using even more automated procedures that the IRS does not regard as audits (called "unreal audits").[87] Confusing IRS correspondence, illiteracy, language barriers, and unequal access to competent tax professionals can cause taxpayers—particularly low income taxpayers—to miss the deadline for filing a petition.[88] Indeed, a 2007 TAS study found more than one-quarter of taxpayers receiving an EITC audit notice did not understand that the IRS was auditing their return, almost 40 percent did not understand what the IRS was questioning, and only about half of the respondents felt that they knew what they needed to do.[89] In other words, there are circumstances in which deficiency procedures do not give taxpayers a realistic opportunity to petition the Tax Court.

---

84 Assessable penalties now include among other things, the penalties for: failure to file timely and accurate information returns (*e.g.*, IRC §§ 6677, 6679, 6682, 6693, 6698, 6699, 6707, 6707A, 6710, 6723), erroneous claims for refund (IRC § 6676), failure to disclose various things to various people or disclosing too much (*e.g.*, IRC §§ 6685, 6705, 6706, 6709, 6711, 6712, 6713, 6714, 6720C, 6721, 6722, 6725), aiding and abetting understatements (IRC § 6701), promoting tax shelters (IRC § 6700), making frivolous tax submissions (IRC § 6702), and the failure to keep certain records (*e.g.*, IRC §§ 6704, 6708).

85 Although some assessable penalties adopted after 1960 are divisible, many are not. *Compare* CCA 201150029 (2011) (IRC § 6677 not divisible); *Christian Laymen in Partnership, Ltd. v. United States*, 1989 U.S. Dist. LEXIS 15932 (W.D. Okla. Dec. 29, 1989) (IRC § 6698 not divisible); *Larson v. United States*, 888 F.3d 578 (2d Cir. 2018) (IRC § 6707 not divisible) *with* CCA 201315017 (2013) (IRC §§ 6721 and 6722 divisible) and CCA 200646016 (2006) (IRC § 6708 divisible). For many others, the divisibility issue has not been addressed. As one treatise explained, "[I]t is not always easy to determine whether a tax is divisible." Michael I. Saltzman, *IRS Practice and Procedure* ¶11.11[1][c] (Revised 2d ed. July 2017).

86 IRC § 6213. The 90-day period becomes 150 days if the notice is addressed to a person outside the U.S. *Id*.

87 For fiscal year (FY) 2017, 71 percent of the IRS's audits were conducted by correspondence — a figure that rises to 81 percent for individual returns with total positive income (TPI) of less than $200,000 and falls to 53 percent for individual returns with TPI of more than $200,000. IRS Data Book, 2017, Pub. 55B, 22 (Mar. 2018) (Table 9a). "Unreal audit" procedures include Automated Underreporter (AUR), Automated Substitute for Return (ASFR), math and clerical errors, and other automated programs. *See*, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 49-63 (Most Serious Problem: *Audit Rates*); National Taxpayer Advocate 2016 Annual Report to Congress 27-29 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*); National Taxpayer Advocate 2011 Annual Report to Congress 24 (Introduction to Revenue Protection Issues: *As the IRS Relies More Heavily on Automation to Strengthen Enforcement, There is Increased Risk It Will Assume Taxpayers Are Cheating, Confuse Taxpayers About Their Rights, and Sidestep Longstanding Taxpayer Protections*); Nina E. Olson, *What's an Audit, Anyway?*, NTA Blog (Jan. 25, 2012), https://taxpayeradvocate.irs.gov/news/what's-an-audit-anyway?category=Tax News.

88 National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 100, 103-104. By comparison, when the IRS audited EITC claimants for its National Research Program, which utilized face-to-face and telephonic communications, 85 percent participated in the audit. *See* IRS, Pub. 5162, *Compliance Estimates for the Earned Income Tax Credit Claimed on 2006-2008 Returns* iii, 6, 8 (Aug. 2014). For a detailed description about why low income taxpayers miss these deadlines along with a similar proposal for reform, see Carlton M. Smith, *Let the Poor Sue For Refund Without Full Payment*, 125 Tax Notes 131 (Oct. 5, 2009).

89 National Taxpayer Advocate 2007 Annual Report to Congress vol. 2, 100, 103-104. Similarly, a more recent survey of Schedule C taxpayers who had been audited found that only 38.8 percent for those audited by mail knew that they had been audited. National Taxpayer Advocate 2017 Annual Report to Congress vol. 2 148, 163-64 (Matthias Kasper, Sebastian Beer, Erich Kirchler & Brian Erard, *Audits, Identity Theft Investigations, and Taxpayer Attitudes: Evidence from a National Survey*).

Moreover, low income taxpayers did not have the same involvement in tax return filing and administration in 1960 when *Flora II* was decided. It was not until 1975 that Congress enacted the EITC as a means-tested tax credit to assist the working poor, and the EITC remained the only refundable tax credit until the Child Tax Credit was enacted in 1997.[90] After 1997, Congress increasingly began using the tax system to distribute benefits to low and middle income taxpayers, such as Economic Stimulus Payments, the Making Work Pay Credit, the Health Coverage Tax Credit, the First-Time Homebuyer Credit, the COBRA Premium Assistance Credit, the American Opportunity Tax Credit, the Adoption Credit, the Small Business Health Care Tax Credit, and the Premium Assistance Tax Credit.[91] In 2017, the maximum EITC was $6,318 and 27 million eligible workers and families received about $65 billion in EITC.[92] Moreover, in 2017 Congress doubled the maximum Child Tax Credit to $2,000, further increasing interactions between low and middle income taxpayers and the tax system.[93]

In addition, in 1960 the automation required for "unreal" audits did not exist. For example, it was not until 1989 that the IRS developed the first prototype of the "automated underreporter" matching system.[94] Thus, while the government's interest in keeping taxpayers out of court to protect the public purse has declined, the need for judicial review by low income taxpayers has increased.

EXPLANATION OF RECOMMENDATIONS

Clarify That the Full Payment Rule Does Not Apply to Liabilities Unless They Were Subject to Review by the Tax Court

Members of the Supreme Court and others have operated under the assumption that the full payment rule only applied where the taxpayer had an opportunity to petition the Tax Court to review them.[95] However, Congress has sometimes carved out exceptions to the full payment rule based on the assumption that it applied to assessable penalties that could not have been appealed to the Tax Court before payment.[96] Based in part on Congress's assumptions, the U.S. Court of Appeals for the Second

90 *See* Pub. L. No. 94-12, § 204, 89 Stat. 26, 30 (1975) (codifying the earned income tax credit (EITC) at IRC § 32); Pub. L. No. 105–34, § 101, 111 Stat. 788, 796 (1997) (codifying the child tax credit at IRC § 24).

91 *See*, *e.g.*, Congressional Budget Office, *Refundable Tax Credits* (2013), http://www.cbo.gov/sites/default/files/cbofiles/attachments/RefundableTaxCredits_One-Col.pdf; National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 43-44.

92 IRS, *EITC Fast Facts* (Jan. 29, 2018), https://www.eitc.irs.gov/partner-toolkit/basic-marketing-communication-materials/eitc-fast-facts/eitc-fast-facts.

93 *See* Pub. L. No. 115-97, § 11022, 131 Stat. 2054, 2073 (2017) (codified at IRC § 24). If the IRS offsets these benefits over a number of years, then by the time these offsets fully pay the liability so that the taxpayer can challenge the underlying assessment, he or she may not be able to recover the offsets from the early years, as discussed above.

94 IRS, *Historical Fact Book, A Chronology 1646-1992*, 232 (1997).

95 *Flora II*, 362 U.S. at 175 ("This contention [requiring taxpayers to pay the full assessments before bringing suits will subject some of them to great hardship] seems to ignore entirely the right of the taxpayer to appeal the deficiency to the Tax Court without paying a cent."); *Laing v. United States*, 423 U.S. 161, 208-09 (1976) (Blackmun, J., dissenting) ("the full-payment rule applies only where… the taxpayer has access to the Tax Court for redetermination prior to payment."). Indeed, critics of the *Larson* decision (discussed above), which applied the full payment rule to assessable penalties, have pointed out that the majority of the Supreme Court in *Laing* did not disagree with J. Blackmun's interpretation of *Flora II*, which would have limited the full payment rule to liabilities that could have been appealed to the Tax Court. *See*, *e.g.*, Andrew Velarde, *Taxpayer Asks Circuit for Do-Over on Full Payment Rule Holding*, 2018 TNT 113-5 (June 12, 2018) (quoting Carlton Smith). Similarly, Mr. Larson pointed out that the Solicitor General agreed with J. Blackmun. *See Larson v. United States*, Docket No. 17-502 (2d Cir. 2018) (petition for rehearing), *reprinted as*, *Individual Seeks Rehearing In Second Circuit Full Payment Rule Case*, 2018 TNT 113-11 (June 12, 2018).

96 *See* IRC §§ 6694(c), 6703(c).

Circuit recently confirmed that the full payment rule applies to assessable penalties.[97] If Congress decides to retain the full payment rule, it should clarify that the rule only applies where the taxpayer has received a notice of deficiency and had an opportunity to participate in a pre-payment review of the dispute by the Tax Court. If this or any similar recommendation is adopted, Congress should also provide that the IRS cannot collect the unpaid portion of a liability while refund litigation is pending concerning the same or similar issues, even if attributable to different periods.[98] The doctrines of *res judicata* and *collateral estoppel* should help to ensure that IRS does not re-litigate the same issues with respect to unpaid liabilities.[99]

By itself, this recommendation would not give the Tax Court jurisdiction to review assessable penalties. As noted below, we recommend that Congress authorize the Tax Court to review them. Expanding the Tax Court's jurisdiction would reduce litigation before the district courts and the Court of Federal Claims because a taxpayer could not litigate the same issue in both fora.[100]

Expand the Definition of Full Payment

The dissenters in *Flora II* worried that the refund limitations period could lapse while a taxpayer was trying to fully pay a liability that he or she wanted to dispute.[101] If Congress decides to retain the full payment rule, it should address this concern. It could do so by treating a liability as fully paid (for purposes of this rule) at the earlier of when the taxpayer has paid something and (a) the IRS classifies the account as currently not collectible due to hardship,[102] or (b) the taxpayer enters into an installment agreement.[103]

Expand the Tax Court's Jurisdiction to Hear Non-Deficiency Cases

If this recommendation is adopted, the Tax Court would have jurisdiction to review liabilities proposed by the IRS, where the taxpayer did not receive a notice of deficiency (*e.g.*, both the explicitly and implicitly assessable penalties). Before assessing assessable penalties, the IRS would be required to send the taxpayer a non-deficiency notice, which would be similar to a notice of deficiency, and give

---

97 *See Larson v. United States*, 888 F.3d 578 (2d Cir. 2018), *aff'g* 118 A.F.T.R.2d (RIA) 7004 (S.D.N.Y., 2016), *petition for rehearing filed*, Docket No. 16-CV-00245 (June 8, 2018). For a discussion of this case, see Significant Cases, *infra*. Practitioners have called for legislation in response to this decision. *See*, *e.g.*, Lawrence Hill & Richard Nessler, *IRS Penalty Assessments Without Due Process?,* 159 Tax Notes 1763 (June 18, 2018).

98 A full repeal of the full payment rule and similar proposals are not necessarily inconsistent with the Anti-Injunction Act (IRC § 7421), or the tax exception to the Declaratory Judgment Act (28 U.S.C. § 2201) if the taxpayer has paid some amount of the liability before filing suit and if the suit does not prevent the government from collecting unpaid amounts. If the full payment rule is repealed or limited, however, Congress should make clear that the suits it intends to authorize do not violate IRC § 7421 or 28 U.S.C. § 2201 with respect to unpaid amounts that will be decided in connection with the taxpayer's suit. For example, Congress could expand the scope of IRC § 6331(i) which prevents the IRS from levying while a taxpayer is litigating a divisible tax and IRC § 6331(i)(4)(B) which allows a court to enforce this rule by enjoining collection, notwithstanding IRC § 7421. *See*, *e.g.*, *Beard v. United States*, 99 Fed. Cl. 147 (Fed. Cl. 2011) (enjoining the government's collection action).

99 *See*, *e.g.*, CCDM 34.5.1.1.2.2.4 (Aug. 11, 2004). The IRS authorizes its lawyers to make permissive counterclaims for the unpaid portions of divisible taxes where the counterclaim either relates to the periods in suit or involves the same or similar issues. CCDM 34.5.1.1.2.5 (Aug. 11, 2004).

100 *See* IRC § 7422(e).

101 *Flora II*, 362 U.S. at 195-96 (J. Whittaker, dissenting).

102 IRC § 6343(a)(1)(D) and Treas. Reg. § 301.6343-1(b)(4) require the IRS to release a levy that is creating an economic hardship. Rather than pursuing collection actions that would be unproductive, the IRS reports accounts as currently not collectible when the taxpayer has no assets or income which are, by law, subject to levy. *See* Policy Statement 5-71, IRM 1.2.14.1.14 (Nov. 19, 1980).

103 For a similar proposal, see Carlton M. Smith, *Let the Poor Sue For Refund Without Full Payment*, 125 Tax Notes 131 (Oct. 5, 2009). A similar rule applies to unpaid installments of estate tax under IRC § 7422(j).

the taxpayer a similarly reasonable period to file a petition with the Tax Court. As with a notice of deficiency, the IRS would be allowed to assess and collect the liabilities only after the Tax Court's review is complete or the period for filing suit has expired.

This proposal would give taxpayers access to a specialized and convenient judicial form. The Tax Court is less formal than a district court or the Court of Federal Claims. Since its inception, the Tax Court has been particularly accessible to *pro se* taxpayers and those wishing to be represented by non-attorneys.[104] Moreover, adjustments to the Tax Court's rules, jurisdiction, and Low Income Taxpayer Clinics and state and local bar association referral practices (*e.g.*, calendar call programs) have made it even more informal and accessible.[105] Over 70 percent of all Tax Court petitions were filed by self-represented taxpayers in 2015.[106]

Alternatively, Expand the Tax Court's Jurisdiction Under CDP

In lieu of expanding the Tax Court's jurisdiction to cover non-deficiency cases as recommended above, Congress could consider expanding its CDP jurisdiction to cover liabilities not subject to deficiency procedures, even if the taxpayer had an opportunity for an *administrative* review by Appeals. While this alternative would provide an opportunity for judicial review of assessable penalties, judicial review would only occur after they are assessed by the IRS.

Once a liability is assessed, the IRS may begin collection (*e.g.*, by offsetting refunds and issuing a lien notice), and the taxpayer's access to credit may be constrained. It is not clear why a taxpayer should not have the opportunity to appeal an IRS-asserted liability in court before the IRS assesses it, damages the taxpayer's credit, and begins the collection process. Nonetheless, an expansion of CDP could help to ensure that accessible penalties could be reviewed by a court before they are fully paid.

If Congress expands CDP, it should address several of its limitations. First, because the right to a CDP hearing is triggered by a lien or levy, a CDP appeal is not necessarily available to taxpayers whose liabilities are collected by offset (*e.g.*, refundable credits the taxpayer would otherwise have received in a subsequent year). Thus, Congress might want to require the IRS to send CDP notices before offsetting refundable tax credits and allow taxpayers to appeal the resulting determinations to the Tax Court.

---

104 Deborah A. Geier, *The Tax Court, Article III, and the Proposal Advanced by the Federal Courts Study Committee: A Study in Applied Constitutional Theory*, Cornell L. Rev., n. 23 (July 1991).

105 *See* IRC § 7463; Tax Court Rule 174(b). *See also* Harold Dubroff & Brant J. Hellwig, The United States Tax Court, An Historical Analysis 883-901 (2d Ed. 2014), https://www.ustaxcourt.gov/book/Dubroff_Hellwig.pdf; The Federal Courts Study Committee, *Report of The Federal Courts Study Committee* 70 (Apr. 2, 1990). For a summary of LITC activities to assist taxpayers before the Tax Court, see IRS Pub. 5066, *Assisting Taxpayers Face-to-Face with An Increasingly Automated Tax System*, LITC Program Report (Feb. 2018), https://www.irs.gov/pub/irs-pdf/p5066.pdf. For a discussion of Tax Court calendar call programs, see U.S. Tax Court, *Clinical, Student Practice & Bar Sponsored Calendar Call Program*, https://www.ustaxcourt.gov/clinics.htm (Aug. 6, 2018).

106 Hon. Peter J. Panuthos, *The United States Tax Court and Calendar Call Programs*, 68 Tax Law. 439, 440 (2015).

Second, the Tax Court does not have jurisdiction to order refunds in CDP appeals (*e.g.*, to order refunds of amounts that had been paid or offset).[107] Accordingly, Congress might also want to expand its jurisdiction to clarify that it could determine overpayments in connection with these appeals.[108]

In addition, both the time for requesting a CDP hearing, and the time for filing a Tax Court petition after receipt of an unfavorable CDP determination from Appeals is relatively short—only 30 days, as compared to 90 days (or 150 days if addressed to a taxpayer overseas) after the IRS sends a notice of deficiency.[109] Moreover, unlike the notice of deficiency, the CDP notice and the CDP determination do not list the last day for the taxpayer to file the request for a hearing or to petition the Tax Court.[110] Congress should also address these problems in connection with any expansion of CDP (*e.g.*, by giving taxpayers as long to respond to a CDP notice as they have in responding to a notice of deficiency and listing that deadline on the notice).

Expanding the Tax Court's jurisdiction will not open the floodgates to litigation. Between 2004 and 2017 only 1.41 percent of the taxpayers who received a CDP notice requested an administrative hearing (*i.e.*, 365,686 out of 25,991,970) and only 0.08 percent filed a petition with the Tax Court (*i.e.*, 20,248 out of 25,991,970).[111] Moreover, because these percentages include taxpayers with disputes about both collection alternatives and the underlying liability, we might expect this more limited expansion to increase the number of petitions by an even smaller fraction.

107 *See*, *e.g.*, *Greene-Thapedi v. Comm'r*, 126 T.C. 1 (2006) (holding the Tax Court lacked jurisdiction to consider overpayment in CDP appeal); *McLane v. Comm'r*, T.C. Memo. 2018-149 (same, even though the taxpayer had not received a notice of deficiency). For further discussion of these issues and the need for legislation, see, *e.g.*, Keith Fogg, *Tax Court Reiterates That It Lacks Refund Jurisdiction in Collection Due Process Cases*, Procedurally Taxing Blog (Oct. 4, 2018), http://procedurallytaxing.com/tax-court-reiterates-that-it-lacks-refund-jurisdiction-in-collection-due-process-cases/.

108 For a legislative recommendation to address this problem, see National Taxpayer Advocate 2017 Annual Report to Congress 293-298 (Legislative Recommendation: *Amend IRC § 6330 to Allow the Tax Court Jurisdiction to Determine Overpayments*).

109 *Compare* IRC §§ 6330(a)(2)(C), (3)(B), and 6330(d)(1) *with* IRC §§ 6212, 6213. For an example of the problems this short period creates, see, *e.g.*, Carlton Smith, *Atuke v. Comm'r: A Clearly Unfair Dismissal for Lack of Jurisdiction Where the Taxpayer Had No Time to Timely File*, Procedurally Taxing Blog (Apr. 19, 2016), https://procedurallytaxing.com/atuke-v-commr-a-clearly-unfair-dismissal-for-lack-of-jurisdiction-where-the-taxpayer-had-no-time-to-timely-file-2/. By the time the IRS mailed CDP notices to individuals in FY 2017, the average delinquency was about 751 days old, and a median of about 441 days old. TAS analysis of Individual Master File, Individual Accounts Receivable Dollar Inventory (Sept. 23, 2018). Observing that CDP cases take longer for the government to resolve than deficiency cases once they reach the Tax Court, some have argued that taxpayers should not have to respond more quickly in CDP cases than in deficiency cases. *See* Carlton Smith & Keith Fogg, *Tax Court Collection Due Process Cases Take Too Long*, 130 Tax Notes 403 (Jan. 24, 2011); Carlton Smith & Keith Fogg, *Collection Due Process Hearings Should Be Expedited*, 125 Tax Notes 919 (Nov. 23, 2009).

110 For a recommendation to address this problem, see National Taxpayer Advocate 2017 Annual Report to Congress 299-306 (Legislative Recommendation: *Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated As Timely*).

111 TAS analysis of CDP data (Sept. 5, 2018).

Appendix: Summary of The Flora Decisions

After the IRS recharacterized a loss that Mr. Flora had incurred in 1950 as a capital loss (rather than an ordinary loss) and sent him a notice of deficiency, he did not timely petition the Tax Court. The IRS then assessed a $28,908.60 deficiency. The taxpayer made payments totaling $5,058.54, and then submitted a claim for refund, which the IRS disallowed. In 1956, he filed suit in the U.S. District Court for the District of Wyoming requesting a refund under the Tucker Act, 28 U.S.C. § 1346(a)(1). The Tucker Act authorized the court to hear suits for the recovery of:

> "*any internal-revenue tax* alleged to have been erroneously or illegally assessed or collected, or *any penalty* claimed to have been collected without authority or *any sum* alleged to have been excessive or in any manner wrongfully collected…" [Emphasis added.][112]

The District Court held that because the deficiency was not fully paid the court "should not maintain" the action, but it nonetheless entered a judgement for the government on the merits due to a conflict among the circuits about whether full payment was required.[113] On appeal, the Court of Appeals for the Tenth Circuit remanded the case with instructions to dismiss for lack of subject matter jurisdiction. It reasoned the legislative history of the Revenue Act of 1924, which established the Board of Tax Appeals (BTA, the predecessor of the Tax Court) suggested that the BTA was established as a pre-payment forum to mitigate the "hardship imposed on taxpayers by an inflexible 'pay first, litigate later' rule" and said "the Supreme Court has consistently indicated that full payment of a tax deficiency is a prerequisite to a judicial claim for refund."[114] It also suggested that allowing taxpayers to pay a small portion of a deficiency and sue for a refund of that portion would undermine the requirement of IRC § 7422 that a taxpayer must make an administrative claim for refund before filing suit.

In 1958, in *Flora I* the Supreme Court affirmed with only one dissent. While acknowledging that the Tucker Act authorized the court to determine "any sum," which could be construed as a clear grant of authority, it cited a "sharp division of opinion among the lower courts" as evidence that the language was ambiguous and said that because the Tucker Act is a waiver of sovereign immunity it had to be construed narrowly.[115] It agreed with the Tenth Circuit that the hardship Congress was attempting to alleviate when it subsequently created the BTA as a pre-payment forum was the hardship of having to fully pay a deficiency before filing suit under the Tucker Act. It discounted the taxpayer's argument that BTA addressed another hardship faced by taxpayers who filed suit in a district court before fully paying—that the IRS could continue to collect the disputed liability during the litigation.[116]

The Court also relied on its decision in *Cheatham*, which was decided in 1875 before the Tucker Act was amended in 1921, and involved the limitations period for filing refund claims.[117] In *Cheatham,* the taxpayer argued that her filing was not late, in part, because she had no right of action until the tax

112 28 U.S.C. § 1346(a)(1).

113 *Flora v. United States*, 142 F. Supp. 602, 604-05 (D. Wyo. 1956), *remanded by* 246 F.2d 929 (10th Cir. 1957), *aff'd*, *Flora I*, 357 U.S. 63 (1958), *aff'd*, *Flora II*, 362 U.S. 145 (1960).

114 *Flora*, 246 F.2d 929, 930-31 (10th Cir. 1957) (quoting from *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716 (1929) where the Court said "Before the act of 1924 [establishing the Board of Tax Appeals] the taxpayer could only contest the Commissioner's determination of the amount of the tax after its payment").

115 *Flora I* at 65.

116 *Id.* at 74. It also cited a statement in a House report for a bill that removed a dollar limitation from the Tucker Act that suggested that Congress assumed that full payment was required. *Id.* at 74-75.

117 *Cheatham v. United States*, 92 U.S. 85, 89 (1875).

was fully paid. Although the Court accepted the taxpayer's assertion that she had no right of action until the tax was fully paid, it found reasons for why her filing was nonetheless late.[118] In *dicta*, the *Cheatham* Court discussed its understanding about the full payment rule and the policy reasons for the rule. After quoting this discussion from *Cheatham*, the Court said in *Flora I* that "[c]onsistent with that understanding, there does not appear to be a single case before 1940 in which a taxpayer attempted a suit for refund of income taxes without paying the full amount the Government alleged to be due."[119] This statement was wrong. After a handful of cases were discovered,[120] the Court granted a petition for rehearing and issued *Flora II*, which provides a broader justification for its decision.

In *Flora II*, the Court discounted the argument that the Tucker Act's reference to the recovery of "any sum" plainly authorized a taxpayer to pay a fraction of the liability and then sue to recover it. It said that "any internal-revenue tax" could be interpreted as the entire tax assessment, and that "any sum" could be interpreted as amounts that were neither taxes nor penalties, such as interest. However, it concluded that it faced a "vexing situation—statutory language which is inconclusive and legislative history which is irrelevant."[121]

Next, the Court acknowledged that before the Tucker Act a taxpayer could sue a tax collector (personally) to recover a partial payment of tax and that there was no indication that the Tucker Act intended to change that result, but discounted the implication that there was no full payment rule.[122] The Court reasoned that its "carefully considered *dictum*" in *Cheatham* (discussed above) prevented it from accepting the analogy between an action under the Tucker Act and a common law action against a collector, especially since the *Cheatham* Court was construing a claim-for-refund statute from which, it said, the relevant language of the Tucker Act was presumably taken.[123]

Next, the Court discussed post-Tucker-Act legislation that suggested Congress assumed there was a full payment rule, including (1) legislation in 1924, which established the Board of Tax Appeals, (2) the Declaratory Judgment Act of 1934, as amended in 1935 (DJA, 28 U.S.C. § 2201 *et seq*.,), and (3) IRC § 7422(e). It reiterated the argument expressed in *Flora I* that the BTA was established to provide a pre-payment forum based on the assumption that none existed. Then the Court observed that the DJA granted jurisdiction to "declare the rights and other legal relations of any interested party seeking such declaration," but specifically carved out tax cases.[124] The Court cited legislative history of the DJA, which said that applying it to taxes would work a "radical departure," and also cited commentators who thought the radical departure being referenced was a departure from the full payment rule, which they apparently assumed to exist.[125]

118 The *Cheatham* court disagreed with the taxpayer's argument that the limitations period "cannot begin to run until the cause of action accrued, which in this case was not until the money was paid…. and that it could not have been intended by Congress that the very short limitation of six months should include any time before the money was paid, during which they had no right of action." *Cheatham*, 92 U.S at 87. However, it did not question her assertion that she had no right of action before the money was paid in full.

119 *Flora I*, 357 U.S. at 69. The dissent cited cases from the Eighth, Third, and Second Circuits that had declined to read a full payment rule into the Tucker Act in or after 1940. *Id*. at 76.

120 *See Flora II*, 362 U.S. at 171 n.37 (categorizing the cases) and 181-85 n.3 (J. Whittaker, dissenting, discussing the cases). Justice Frankfurter wrote a separate opinion in *Flora II* to explain that he changed sides because of the majority's mistake and the persuasiveness of the dissent's research in *Flora II*. *Flora II*, 362 U.S. at 177 (J. Frankfurter, concurring with the dissent).

121 *Id.* at 152.

122 *Id.* at 152-53.

123 *Id.* at 155.

124 28 U.S.C. § 2201.

125 *Flora II*, 362 U.S. at 164-65 n.29.

The Court went on to discuss IRC § 7422(e), which specifies what happens if a taxpayer is in tax litigation before a district court or the Court of Claims when the IRS mails the taxpayer a notice of deficiency proposing additional adjustments with respect to tax which is the subject of the taxpayer's suit. It says the suit is stayed to allow the taxpayer to file a petition with the Tax Court, and if the taxpayer does, the original court loses jurisdiction. If the taxpayer decides to remain in the original court, the IRS may bring a counterclaim; and if it does, the taxpayer generally has the burden of proof. The Court suggested that IRC § 7422(e) did not prescribe rules for all the permutations that could occur without a full payment rule. Thus, it said Congress has assumed these problems are nonexistent except in the rare case where the taxpayer sues in a district court and the IRS then notifies him of an additional deficiency.[126]

Finally, the Court said the prevailing view before 1940 was that full payment had to precede suit, overturning the full payment rule would substantially impair the "public purse," and could be expected to shift a "great portion" of the Tax Court's litigation into the district courts.[127]

Four Justices dissented in *Flora II*. The dissenting opinion first discussed a handful of tax cases from before 1940 where taxpayers who had only paid a portion of their liability had petitioned district courts or the Court of Claims in which the government had not objected or if it had, where the court had rejected the full payment rule.[128] Next, it pointed out that the *dictum* in *Cheatham* that was the focus of the majority opinion "did not embrace, and certainly was not directed to, the question whether full payment of an assessment is a condition upon the jurisdiction of a District Court to entertain a suit for refund."[129] Likewise, it said that the majority's reliance on legislative histories other than the Tucker Act, which were "not directed to the question we have here," were "too imprecise for the drawing of such a far-reaching inference, involving, as it does, the interpolation of a drastic qualification into the otherwise plain, clear and unlimited provisions of the statute."[130]

The dissent dismissed any disharmony resulting from concurrent jurisdiction by the Tax Court and district courts because they already had such jurisdiction with respect to refund claims.[131] It dismissed concerns about revenue loss due to the fact that filing in district court did not stay collection, and in any event, taxpayers could stay collection by filing a petition with the Tax Court.[132] Rather, it worried that taxpayers who could only pay a portion of an invalid assessment within the limitations period would be deprived of any means to recover amounts illegally collected.[133]

Turning to the history of the Tucker Act, the dissent observed that in the 1830s tax collectors could be personally liable for monies illegally collected. This potential liability prompted them to withhold disputed collections from the government. In 1839, Congress expressly prohibited collectors from retaining these collections, and in 1845, the Supreme Court held in *Cary v. Curtis* that the 1839 legislation had also terminated the longstanding common law right of action by taxpayers against the collectors.[134] This case prompted Congress to give taxpayers the right to sue the collectors to recover

126 *Flora II*, 362 U.S. at 166.
127 *Id.* at 166-177.
128 *Id.* at 181-185 (J. Whittaker, dissenting).
129 *Id.* at 185.
130 *Id.* at 192.
131 *Id.* at 194 n.17.
132 *Id.* at 194.
133 *Id.* at 195.
134 *Id.* (citing *Cary v. Curtis*, 44 U.S. 236, 239 (1845)).

amounts which were not lawfully "payable in part or in whole."[135] Thus, there was no historic basis for the full payment rule.

The Tucker Act was subsequently enacted in 1887, without making specific reference to taxes or any full payment requirement. It only covered small claims. Taxpayers could still sue collectors for large tax claims. In 1921, the Court held that claims against collectors were personal in nature, and thus, taxpayers could not recover if the collector died. The 1921 amendment to the Tucker Act was designed to allow taxpayers with large tax claims to sue the government in district court.

When Congress amended the Tucker Act in 1921 it went looking for language it could use to refer to taxes. According to the dissent, the language it selected "was chosen because, in another statute, it referred to all of the actions which could be brought for refund of internal revenue taxes" (*i.e.*, what is now IRC § 7422(a), a provision that requires taxpayers to file administrative claims with the IRS before suing in court) and thus should be interpreted broadly.[136] Moreover, the clear language that permitted taxpayers to sue for "any sum," persuaded the dissent that there was no full payment rule.

135 *Flora II*, 362 U.S. at 187 (J. Whittaker, dissenting). The dissent noted that although the statute referred to Customs Collectors, the Court ruled that the legislation also authorized suits to recover illegally collected internal revenue taxes. *Id.* at 188.

136 *Id.* at 195. It also pointed out that the statute at issue in *Cheatham* did not even include the "any sum" language, which makes it even broader. *Id.* at 190 n.15.

LR #4 INNOCENT SPOUSE RELIEF: Clarify That Taxpayers May Raise Innocent Spouse Relief In Refund Suits

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*

PROBLEM

Under Internal Revenue Code (IRC) § 6015(e), the United States Tax Court (the Tax Court) has jurisdiction to review the IRS's denials of requests for innocent spouse relief. Even though taxpayers' right to petition the Tax Court under IRC § 6015(e) is "in addition to any other remedy provided by law," a federal district court refused to consider a taxpayer's innocent spouse claim in a refund suit arising under IRC § 7422. The court's refusal to allow a taxpayer to request innocent spouse relief in a refund suit may create hardship by forcing a taxpayer to seek relief in Tax Court, thus:

- Depriving the taxpayer of his or her right to a jury trial; and
- Depriving a successful taxpayer who makes a deposit to suspend the accrual of interest of the overpayment interest he or she would otherwise receive.

EXAMPLE

In *Chandler v. U.S.*,[2] the IRS denied Ms. Chandler's request for innocent spouse relief from liability for taxes shown on a joint return. Ms. Chandler paid the tax and requested a refund from the IRS, which was denied. As authorized by IRC § 7422, Ms. Chandler brought a refund suit in a United States District Court, claiming that she was entitled to innocent spouse relief, and requesting a jury trial. The government sought dismissal of Ms. Chandler's complaint for lack of subject-matter jurisdiction, contending that the Tax Court has exclusive jurisdiction to review denials of innocent spouse relief. The district court agreed with the government and dismissed the case.

Following the dismissal of her case in district court, Ms. Chandler could have appealed the decision to a United States Court of Appeals.[3] She could not have obtained Tax Court review of the IRS's denial of her request for innocent spouse relief. The deadline for petitioning the Tax Court expired, and the Tax Court does not have jurisdiction to decide refund suits arising under IRC § 7422.[4]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 2018 U.S. Dist. LEXIS 173880 (N.D. Tex. 2018), *adopting* 2018 U.S. Dist. LEXIS 174482 (N.D. Tex. 2018).

3 Notice of appeal is required within 60 days after the entry of judgment by the district court. Fed. R. App. P. 4(a)(1)(B). The district court in *Chandler* entered its judgment on Oct. 9, 2018. As of Dec. 13, 2018, it does not appear that an appeal had been filed.

4 Under IRC § 6015(e)(1)(A)(iii), the deadline for petitioning the Tax Court is 90 days after the IRS mails the taxpayer its final notice of determination.

RECOMMENDATION

Amend IRC §§ 6015 and 66 to clarify that taxpayers are entitled to raise innocent spouse relief in refund suits arising under IRC § 7422.[5]

PRESENT LAW

The Internal Revenue Code Provides Taxpayers With Access to Various Judicial Fora

In general, the Tax Court is the only judicial forum in which a taxpayer can challenge the IRS's assertion that he or she is liable for a deficiency in tax before paying the asserted liability in full.[6] There is no right to a jury trial in Tax Court.[7] Until the Tax Court's decision in a deficiency case becomes final, interest and penalties continue to accrue with respect to the entire unpaid liability, if any, ultimately determined to be owed.[8] A taxpayer who obtains innocent spouse relief in Tax Court may be entitled to a refund to the extent permitted by IRC § 6015(g).[9] Interest on any refund would be payable at the rate of three percentage points above the Federal short-term rate.[10] A taxpayer may, without waiting for the outcome in Tax Court, make a deposit that will suspend the accrual of interest and penalties pending the outcome of the case.[11] If the taxpayer ultimately prevails in the Tax Court litigation, the deposit will be returned with interest at the Federal short-term rate.[12]

Rather than petitioning the Tax Court, a taxpayer may pay the asserted tax, which also suspends the accrual of interest and penalties, and then request a refund from the IRS.[13] Taxpayers who pay a proposed deficiency and whose claims for tax refunds have been denied by the IRS cannot bring refund suits in the Tax Court, but they may seek refunds in the United States district courts or in the United States Court of

---

5 For legislative recommendations relating to innocent spouse claims in collection proceedings, see National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); National Taxpayer Advocate 2009 Annual Report to Congress 378 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*); National Taxpayer Advocate 2007 Annual Report to Congress 549 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*). The National Taxpayer Advocate reiterates her recommendations this year. *See* National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (Dec. 2018).

6 IRC § 6213(a). IRC § 6211(a) defines "deficiency" as the amount by which the correct tax exceeds the excess of: (1) the sum of the amount reported on the taxpayer's return for such tax if a return was filed and an amount of tax was reported on the return plus amounts previously assessed (or collected without assessment) as a deficiency, over (2) the amount of any rebates.

7 *See, e.g., Statland v. U.S.*, 178 F.3d 465, 472-473 (7th Cir. 1999).

8 See IRC § 6601, imposing interest on underpayments, generally running from the due date of return to the date the liability is paid. See also, *e.g.*, IRC § 6662(b), imposing a 20 percent accuracy-related penalty on certain underpayments; under IRC § 6601(e)(2)(B), interest accrues on this penalty beginning on the date on which the return was required to be filed.

9 IRC § 6015(g) provides that "Except as provided in paragraphs (2) and (3), notwithstanding any other law or rule of law (other than section 6511, 6512(b), 7121, or 7122), credit or refund shall be allowed or made to the extent attributable to the application of this section."

10 IRC § 6621(a).

11 IRC § 6603(b).

12 IRC § 6603(d)(4); IRC § 6621(b). *Minihan v. Comm'r*, 138 T.C. 1 (2012). Interest on the refund would be payable at the rate of three percentage points above the Federal short-term rate. IRC § 6621(a).

13 IRC § 6511.

Federal Claims.[14] A jury trial is available if the refund suit is brought in a United States District Court.[15] If an individual taxpayer ultimately prevails in the refund suit, his or her payment will be refunded together with interest at the rate of three percentage points above the Federal short-term rate.[16]

The Innocent Spouse Rules Evolved Over Decades, but Access to More Than One Judicial Forum Remained Intact

IRC § 6013(e), enacted in 1971, provided relief from tax liability arising from filing a joint return with a spouse.[17] Relief was available to a requesting spouse where there had been an omission of income attributable to the other spouse of over 25 percent of the gross income shown on the return. The spouse seeking relief also had to show that he or she did not know or have reason to know of the omission, did not significantly benefit from it, and that it would be inequitable to hold the requesting spouse liable for the deficiency attributable to the omitted income.[18]

Taxpayers sought Tax Court review of the IRS's denial of their innocent spouse claims under the 1971 legislation by commencing deficiency proceedings in the Tax Court.[19] Taxpayers also sought innocent spouse relief in refund suits brought in other federal courts.[20]

With the Tax Reform Act of 1984, Congress expanded the relief available under IRC § 6013(e) to include any substantial understatement *(i.e.*, over $500) attributable to a spouse's grossly erroneous items (including omissions of gross income and improperly claimed deductions) of which the taxpayer did not know or have reason to know.[21] At the same time, IRC § 66 was also amended to provide for relief from the liability that arises by operation of community property laws.[22]

Taxpayers continued to seek innocent spouse relief pursuant to amended IRC § 6013(e), not only in Tax Court deficiency proceedings, but also in refund suits they brought in other federal courts.[23]

The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98) again revised the innocent spouse provisions.[24] IRC § 6013(e) was repealed, and the innocent spouse rules are now found in IRC § 6015. IRC § 6015 provides three avenues for obtaining innocent spouse relief. Section 6015(b) provides "traditional" relief from deficiencies and is available to all joint filers regardless of marital status. Section 6015(c) provides relief from deficiencies for certain spouses who are divorced, separated, widowed, or not living together, by allocating the liability between each spouse. Section 6015(f)

---

14 IRC § 7422; 28 U.S.C. §§ 1346(a)(1) and 1491. Unlike in Tax Court, to receive judicial review of a tax liability in one of the refund fora, a taxpayer generally must first pay the disputed income tax in full and then file a claim for refund with the IRS. *See Flora v. U.S.*, 362 U.S. 145 (1960).

15 28 U.S.C § 2402. There is no right to a jury trial in the United States Court of Federal Claims, *U.S. v. Sherwood*, 312 U.S. 584, 587 (1941); *Webster v. U.S.*, 74 Fed. Cl. 439, 444 (2006).

16 IRC § 6621(a).

17 *See* Pub. L. No. 91-679, 84 Stat. 2063-64 (1971) (adding IRC § 6013(e)).

18 IRC § 6013(e)(1)(A)-(C), as enacted by Pub. L. No. 91-679.

19 IRC § 6213. *See, e.g.*, *Sonnenborn v. Comm'r*, 57 T.C. 373 (1971). The new law applied retroactively to all tax years subject to the Internal Revenue Codes of 1939 and 1954. Pub. L. No. 91-679, § 3.

20 *See, e.g.*, *Sanders v. U.S.*, 509 F.2d 162 (5th Cir. 1975) *aff'g* 369 F. Supp. 160 (N.D. Ala. 1973).

21 Pub. L. No. 98-369, Div. A, § 424(a), 98 Stat. 801 (1984). To qualify for relief, the substantial understatement had to exceed 25 percent of the spouse's adjusted gross income (ten percent if the adjusted gross income was $20,000 or less).

22 Pub. L. No. 98-369, Div. A, § 424(b), 98 Stat. 801 (1984). Spouses who live in community property states and file separate returns are generally required to report one-half of the community income on their separate returns. *Poe v. Seaborn*, 282 U.S. 101 (1930).

23 *See, e.g.*, *Farmer v. U.S.*, 794 F.2d 1163 (6th Cir. 1986); *Mlay v. IRS*, 168 F. Supp. 2d 781 (S.D. Ohio 2001).

24 Pub. L.105-206, § 3201(a), (b), 112 Stat. 685 at 734, 739.

provides "equitable" relief from both deficiencies and underpayments, but only applies if a taxpayer is not eligible for relief under IRC § 6015(b) or (c). RRA 98 also amended IRC § 66(c) to provide for equitable relief to taxpayers in community property states.

RRA 98 also enacted IRC § 6015(e), which specified that Tax Court review was available with respect to denials of innocent spouse relief under IRC § 6015 (b) or (c), or where the IRS failed to make a determination within six months after relief was requested.[25] In addition, IRC § 6015(e)(3)(C) provided that if either joint filer brought a timely refund suit while an innocent spouse claim was pending in Tax Court, then the Tax Court was deprived of jurisdiction and "the court acquiring jurisdiction shall have jurisdiction over the petition filed under this subsection."[26]

Further amendments to IRC § 6015(e)(1)(A) in 2001 clarified that Tax Court review of innocent spouse determinations is "in addition to any other remedy provided by law."[27] As the Conference Report on the 2001 legislation noted:

> *Non-exclusivity of judicial remedy.*—Some have suggested that the IRS Restructuring Act administrative and judicial process for innocent spouse relief was intended to be the exclusive avenue by which relief could be sought. The bill clarifies Congressional intent that the procedures of section 6015(e) were intended to be additional, non-exclusive avenues by which innocent spouse relief could be considered.[28]

Following the 1998 and 2001 legislation, at least one federal court considered a taxpayer's claim for innocent spouse relief in a refund suit, consistently with IRC § 6015(e)(1)(A).[29] The Tax Relief and Health Care Act of 2006 amended IRC § 6015(e) to expressly provide that the Tax Court has jurisdiction in "stand alone" cases to review IRC § 6015(f) determinations, even where no deficiency has been asserted, but did not affect the provisions of IRC § 6015(e)(1)(A).[30]

A District Court Recently Held It Did Not Have Jurisdiction to Decide an Innocent Spouse Claim in a Refund Suit

In *Chandler v. U.S.*, the district court refused to consider a taxpayer's claim for innocent spouse relief in a refund suit, holding that the Tax Court has exclusive jurisdiction to review the IRS's denial of requests

---

25 Pub. L.105-206, § 3201(a), 112 Stat. 685 at 734.

26 *Id*. In hearings that preceded the enactment of RRA 98, at least one witness expressed reservations about this provision, noting that requiring removal of an innocent spouse case from the Tax Court simply because of an act by the other spouse "is to perpetuate the situation that brought her to the Tax Court in the first place." *IRS Restructuring Hearings: Hearing Before the Sen. Comm. on Finance*, 105th Cong., 2nd Sess. 126 (Feb. 5, 1998) (statement of Nina E. Olson, Executive Director, The Community Tax Law Project). IRC § 6015(e)(3)(C) now appears as IRC § 6015(e)(3).

27 Community Renewal Tax Relief Act of 2000, Pub. L. 106-544, App'x G, § 313(a), 114 Stat. 2673, 2763A–641 (2001), amending IRC § 6015(e)(1) to read as follows: ''(A) IN GENERAL.—In addition to any other remedy provided by law, the individual may petition the Tax Court (and the Tax Court shall have jurisdiction) to determine the appropriate relief available to the individual under this section if such petition is filed—

(i) at any time after the earlier of—

(I) the date the Secretary mails, by certified or registered mail to the taxpayer's last known address, notice of the Secretary's final determination of relief available to the individual, or

(II) the date which is 6 months after the date such election is filed with the Secretary, and

(ii) not later than the close of the 90th day after the date described in clause (i)(I).''

28 H.R. Rep. No. 106-1033, at 1023 (2000) (Conf. Rep.).

29 *See*, *e.g.*, *Flores v. U.S.*, 51 Fed. Cl. 49 (2001).

30 Pub. L. No. 109-432, Div. C, § 408(a), (c), 120 Stat. 2922, 3061-62 (2006), amending IRC § 6015(e)(1) to provide: "In the case of an individual against whom a deficiency has been asserted and who elects to have subsection (b) or (c) apply, *or in the case of an individual who requests equitable relief under subsection (f)*—" (emphasis added).

for innocent spouse relief.[31] The court relied on decisions by other courts that refused to allow taxpayers to seek innocent spouse relief in collection proceedings brought in federal courts.[32] The National Taxpayer Advocate believes the line of cases the *Chandler* court relied on were incorrectly decided. For over ten years she has recommended legislation to clarify that the Tax Court does not have exclusive jurisdiction to decide innocent spouse cases and that taxpayers may seek innocent spouse relief in suits brought in other federal courts.[33]

REASONS FOR CHANGE

Notwithstanding IRC § 6015(e)(1)(A), which provides that an individual who seeks relief from joint liability may petition the Tax Court "in addition to any other remedy provided by law," in 2018 a district court held that taxpayers cannot seek relief under IRC § 6015 in a refund suit. Other district courts have for decades allowed the claim in refund suits. The *Chandler* case adds to existing confusion about the extent to which taxpayers may seek innocent spouse relief in a judicial forum other than the Tax Court.

The decision in *Chandler*, by foreclosing district court review of innocent spouse claims, leaves taxpayers with only one forum—the Tax Court—in which to seek review of the IRS's decision to deny their claims. Because there is no right to a jury trial in Tax Court, the *Chandler* decision also forecloses taxpayers' right to have their cases decided by a jury.

The *Chandler* decision also forces taxpayers who make deposits to suspend the accrual of interest and penalties while their claims are decided in the Tax Court to forego three percentage points of interest if they prevail in Tax Court and are entitled to the return of their deposit.

Even if a different taxpayer in the same situation were to appeal the outcome in the *Chandler* case to a United States Court of Appeal and prevail, the appellate court's decision would be binding precedent only with respect to district courts within the jurisdiction of that Court of Appeals. Taxpayers need clarification that the defense may be raised in collection suits in any district court.

EXPLANATION OF RECOMMENDATION

The National Taxpayer Advocate's recommendation will clarify that, consistent with the statutory language of IRC § 6015 and with judicial precedent, taxpayers may seek innocent spouse relief under IRC §§ 66 and 6015 in refund suits. Clarification will avert further confusion as to whether seeking innocent spouse relief is allowable in federal courts and will provide uniformity among district courts.

---

31 *Chandler v. U.S.*, 2018 U.S. Dist. LEXIS 173880 (N.D. Tex. 2018) *adopting* 2018 U.S. Dist. LEXIS 174482 (N.D. Tex. 2018).

32 Cases the court relied on include *U.S. v. Boynton*, 99 A.F.T.R.2d (RIA) 920 (S.D. Cal. 2007); *U.S. v. LeBeau*, 109 A.F.T.R.2d (RIA) 1369 (S.D. Cal. 2012); and *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (N.D. Ill. 2012).

33 National Taxpayer Advocate 2010 Annual Report to Congress 377 (Legislative Recommendation: *Allow Taxpayers to Request Equitable Relief Under Internal Revenue Code Section 6015(f) or 66(c) at Any Time Before Expiration of the Period of Limitations on Collection and to Raise Innocent Spouse Relief as a Defense in Collection Actions*); National Taxpayer Advocate 2009 Annual Report to Congress 378 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*); National Taxpayer Advocate 2007 Annual Report to Congress 549 (Legislative Recommendation: *Allow Taxpayers to Raise Relief Under Internal Revenue Code Sections 6015 and 66 as a Defense in Collection Actions*). The National Taxpayer Advocate reiterates her recommendations this year. *See* National Taxpayer Advocate 2019 Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* (Dec. 2018).

LR #5

TAX COURT JURISDICTION: Fix the Donut Hole in the Tax Court's Jurisdiction to Determine Overpayments by Non-Filers with Filing Extensions

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

PROBLEM

A non-filer who has overpaid his or her taxes by the original filing deadline generally has two years from that date to file a claim for refund.[2] Under a special rule, however, if the IRS mails the non-filer a notice of deficiency during the first six months of the third year after the original filing deadline and he or she timely petitions the Tax Court, then the Tax Court generally has jurisdiction to refund or credit the overpayment.[3] It would have no such jurisdiction though, if the taxpayer had obtained a six-month filing extension.[4] Congress may have believed it authorized the Tax Court to credit or refund overpayments in this situation in 1997, but a recent decision by the Tax Court in *Borenstein* reveals that the legislative fix was incomplete.[5]

EXAMPLE[6]

Ms. B and Ms. C each overpay their taxes for 2012 on April 15, 2013.[7] Ms. B timely requests an extension to file, but Ms. C does not. Neither files a return before the IRS sends a notice of deficiency, which it does on June 19, 2015. Each contests the notice and seeks a refund, filing a petition with the Tax Court. The Tax Court has jurisdiction under Internal Revenue Code (IRC) § 6512(b)(3) to determine Ms. C's overpayment because the IRS sent the notice of deficiency during the third year after Ms. C's tax return due date (*i.e.*, June 19, 2015 is between April 15, 2015 and April 15, 2016). But the Tax Court has no similar jurisdiction to determine Ms. B's overpayment because the IRS sent

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* IRC §§ 6511(a), (b)(2).

3 *See* IRC §§ 6513(b) (pre-payments deemed paid on due date), 6512(b)(3)(flush) (Tax Court jurisdiction extended for non-filers), 6511(a) (limitations period), (b)(2) (lookback period).

4 *Borenstein v. Comm'r*, 149 T.C. No. 10 (2017), *appeal docketed*, No. 17-390 (2d Cir. Dec. 4, 2017) (hereinafter *Borenstein*) (interpreting IRC § 6512(b)(3)(flush)).

5 Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 1282(a) and (b), 111 Stat. 788, 1037-38 (1997) (codified at IRC § 6512(b)(3)(flush)). For a summary of *Borenstein*, see *Significant Cases*, *infra*.

6 This hypothetical example is loosely based on the facts presented in the *Borenstein* case.

7 For purposes of IRC §§ 6511 and 6522, income tax withheld is deemed paid on April 15. *See* IRC § 6513(b)(1). Similarly, estimated tax is deemed paid on April 15. *See* IRC § 6513(b)(2).

the notice of deficiency during the *second* year after Ms. B's *extended* due date (*i.e.*, June 19, 2015 is between October 15, 2014 and October 15, 2015). The court lacks jurisdiction to determine Ms. B's overpayment because the IRS mailed the notice of deficiency at just the wrong time—more than two years after she paid the tax but before the third year after her *extended* filing date.

RECOMMENDATION

Amend IRC § 6512(b)(3) to clarify that when the IRS mails a notice of deficiency after the second year following the due date of the return (without regard to extensions) and before the taxpayer files a return, the limitations and lookback periods for filing a claim for refund or credit (under IRC § 6511(a) and (b)(2)) are at least three years from the due date of the return (*without regard to extensions*).

PRESENT LAW

Withholding and other pre-payments are generally deemed paid on the due date of the return without regard to extensions.[8] In general, a taxpayer must file a claim for refund of an overpayment within two years of paying the tax or within three years of filing the return, whichever is later (*i.e.*, the limitations period).[9] The amount that can be credited or refunded is limited to amounts paid within the applicable lookback period.[10] If the taxpayer files a return and the claim for refund is filed within the three-year limitations period, then the lookback period is three years, plus any period of any filing extension (*i.e.*, the three-year lookback period).[11] Otherwise, the lookback period is the two-year period preceding the claim (*i.e.*, the two-year lookback period).[12]

If a taxpayer who has not filed a claim for refund receives a notice of deficiency and petitions the Tax Court, then the Tax Court generally has jurisdiction to determine whether the taxpayer is due a refund to the same extent the IRS could have considered a claim filed on the date the IRS mailed the notice of deficiency.[13] However, a special rule applies to extend the limitations and lookback periods (under the final sentence of IRC § 6512(b)(3) when the IRS mails a notice of deficiency *before* the taxpayer files a return. In that case, if the IRS mails the notice of deficiency "during the third year after the due date (with extensions) for filing the return," then the limitations and lookback periods are three years (not two years), even though the taxpayer has not filed a return.

The special rule in IRC § 6512(b)(3) is supposed to put non-filers who receive notices of deficiency after the two-year lookback period on the same footing as those who file returns on the same day as the IRS mails the notice of deficiency.[14] In *Borenstein*, however, the Tax Court concluded that it has no jurisdiction if the IRS mails the notice of deficiency *after* the second year following the due date (without extensions) and *before* the third year following the due date (with extensions). Thus, the Tax Court determined that there is a donut hole in its jurisdiction.

8 *See* IRC § 6513(b).
9 *See* IRC § 6511(a).
10 *See* IRC § 6511(b)(2).
11 *See* IRC § 6511(a), (b)(2)(A).
12 *See* IRC § 6511(a), (b)(2)(B).
13 *See* IRC § 6512(b)(1), (3)(B).
14 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep.).

REASONS FOR CHANGE

The final sentence of IRC § 6512(b)(3) was enacted in 1997 in response to a decision by the Supreme Court, which held that the two-year lookback period applied to a non-filer because the person had not filed a return before the IRS mailed the notice of deficiency.[15] The Conference Committee report explained that:

> [i]f the same taxpayer had filed a return on the date the notice of deficiency was issued, and then claimed a refund, the 3-year 'look back' rule would apply, and the taxpayer could have obtained a refund of the overwithheld amounts….[16]

The Committee apparently believed it was appropriate to eliminate this disparate treatment. The report also described the law as permitting taxpayers "who initially fail to file a return, but who receive a notice of deficiency and file suit to contest it in Tax Court during the third year after the return due date, to obtain a refund of excessive amounts paid within the three-year period prior to the date of the deficiency notice."[17] However, this description may not have been accurate. The final sentence of IRC § 6512(b)(3) states:

> … where the date of the mailing of the notice of deficiency is during the third year after the **due date (with extensions)** for filing the return of tax and no return was filed before such date, the applicable [lookback] period under subsections (a) and (b)(2) of section 6511 shall be 3 years. [Emphasis added.]

For non-filers who filed timely extensions of the filing deadline, the Tax Court in *Borenstein* interpreted the parenthetical "with extensions" in a way that undercuts Congress's intention to put a non-filer on the same footing as a taxpayer who filed a return on the day the IRS mailed the notice of deficiency. Although the *Borenstein* case is being appealed to the U.S. Court of Appeals for the Second Circuit, the Tax Court would not have to follow a taxpayer-favorable Second Circuit decision in cases arising in other circuits.[18] Thus, unless the Tax Court revisits its decision, a legislative fix is needed.

EXPLANATION OF RECOMMENDATION

The recommendation would put all non-filers who receive notices of deficiency after the two-year lookback period on the same footing as those who file returns on the same day as the IRS mails the notice of deficiency, as intended by Congress in 1997.[19] Specifically, it would permit those who contest the deficiency in the Tax Court during the third year after the return due date (without extension) to obtain credits and refunds of amounts overwithheld and paid or deemed paid on the due date, even if they timely requested a filing extension.

---

15 *Comm'r v. Lundy*, 516 U.S. 235 (1996).

16 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep).

17 *Id*.

18 *See Golsen v. Comm'r*, 54 T.C. 742, 757 (1970), *aff'd*, 445 F.2d 985 (10th Cir. 1971). *See also Glaze v. United States*, 641 F.2d 339 (5th Cir. 1981), *action on dec*., 1981-140 (June 2, 1981); Chief Counsel Notice CC-2006-010 (Mar. 2, 2006).

19 H.R. Rep. No. 105-220, at 701 (1997) (Conf. Rep).

LR #6

INTERGOVERNMENTAL AGREEMENTS (IGAS): Amend Internal Revenue Code § 1474 to Allow a Period of Notice and Comment on New Intergovernmental Agreements (IGAs) and to Require That the IRS Notify Taxpayers Before Their Data Is Transferred to a Foreign Jurisdiction Pursuant to These IGAs, Unless Unique and Compelling Circumstances Exist

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Privacy*
- *The Right to Confidentiality*

PROBLEM

The Foreign Account Tax Compliance Act (FATCA) generally requires foreign financial institutions (FFIs) to provide the U.S. with information regarding foreign accounts held by U.S. taxpayers.[2] Typically, this information exchange occurs via intergovernmental agreements (IGAs), under which FFIs furnish the information to their local tax authority, which in turn transfers it to the U.S.[3] These IGAs also generally incorporate reciprocity, pursuant to which the U.S. agrees to provide the foreign jurisdiction with information regarding its citizens or residents maintaining accounts in the U.S.[4]

As previously cautioned by the National Taxpayer Advocate, the information sharing contemplated by FATCA and similar programs can be extremely helpful in identifying and preventing tax evasion through the use of offshore accounts, but it also presents enormous risks to taxpayer rights.[5] Recognizing the importance of taxpayers' *right to privacy* and *right to confidentiality*, Congress has enacted significant taxpayer protections relating to disclosure and use of taxpayer information.[6] Moreover, the National Institute of Standards and Technology (NIST) has developed detailed

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010) (adding IRC §§ 1471-1474; 6038D). "U.S. taxpayer" is not a specifically defined term within the IRC. But, for purposes of this analysis, it roughly equates to the term "specified United States person" as defined in IRC § 1473(3).

3 U.S. Department of Treasury, *Foreign Account Tax Compliance Act (FATCA)* (Apr. 11, 2018), https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

4 *Id.*

5 National Taxpayer Advocate 2013 Annual Report to Congress 244; Nina E. Olson, *An Analysis of Tax Settlement Programs as Amnesties - When Should the Government Offer Them and How Should They Be Structured? (Part 1 of 3)*, NTA Blog, (Mar. 14, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-analysis-of-tax-settlement-programs-as-amnesties-part-1; Nina E. Olson, *An Analysis of Tax Settlement Programs as Amnesties - Why IRS's Offshore Voluntary Disclosure Settlement Programs Posed Risks to Voluntary Compliance (Part 2 of 3)*, NTA Blog, (Mar. 21, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-an-analysis-of-tax-settlement-programs-as-amnesties-why-irs-s-offshore-voluntary-disclosure-settlement-programs-posed-risks-to-voluntary-compliance-part-2-of-3; Nina E. Olson, *An Analysis of Tax Settlement Programs as Amnesties: A Discussion of Belated Alternatives to the Offshore Voluntary Disclosure Program and Recommendations for Further Improvements (Part 3 of 3)*, NTA Blog, (Mar. 30, 2018), https://taxpayeradvocate.irs.gov/news/an-analysis-of-tax-settlement-programs-as-amnesties-a-discussion-of-belated-alternatives-to-the-offshore-voluntary-disclosure-program-and-recommendations-for-further-improvements-part-3-of-3.

6 *See, e.g.*, IRC § 7213, 6103. *See also* IRC §§ 7803(a)(3)(G), (H).

cybersecurity guidelines, to which all federal agencies, including the IRS, must conform.[7] Nevertheless, the IRS is exchanging U.S. taxpayer information under circumstances where the data transfers to foreign recipients do not conform to NIST guidelines, and where the IRS cannot ensure that the data is used properly by IGA partners.[8]

The IRS has identified the risks inherent in this approach, but has determined that these risks are acceptable.[9] The data being disclosed and potentially breached, however, relates to taxpayers, not to the IRS. Taxpayers, rather than the IRS, are exposed to the consequences of data theft or misuse potentially arising during or after information transfers to foreign partners pursuant to IGAs. Currently, however, taxpayers have no voice in these IGAs and receive no notification that their personal information is being transferred outside of U.S. jurisdiction.[10]

EXAMPLE

Taxpayer is a citizen of the U.S. but is currently a resident of a foreign country. The U.S. and the foreign country enter into an IGA, which contemplates the reciprocal sharing of taxpayer information. Once the IGA is in force and the U.S. has done as much as it can to confirm that the cybersecurity measures of the foreign country are satisfactory, the reciprocal exchange of information begins. As part of that exchange, Taxpayer's personal information is provided to the foreign country without Taxpayer's specific knowledge. Once the information arrives in the foreign country and is beyond the continuing oversight of the IRS, a data breach occurs. As a result, Taxpayer's personal information is exposed and Taxpayer becomes the victim of identity theft. Unlike in the U.S., the foreign country does not follow the practice of alerting taxpayers when data breaches occur. Thus, the identity theft results in substantial economic damage to Taxpayer in part because Taxpayer remains unaware of the data breach until unauthorized account activity begins to appear. Moreover, Taxpayer's risk for subsequent damage has effectively been doubled by the circumstance that Taxpayer's personal information now is maintained in two different jurisdictions, thereby increasing exposure to unauthorized disclosure or improper use of that information.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend Internal Revenue Code (IRC) § 1474 to add:

- IRC § 1474(g)(1), requiring the public announcement of IGAs for notice and comment by taxpayers;
- IRC § 1474(g)(2), requiring that, as part of this announcement, the IRS specify the extent to which the proposed IGA partner jurisdiction complies with the cybersecurity standards to which U.S. federal agencies are held and the taxpayer privacy standards which govern the IRS; and

7 National Institute of Standards and Technology (NIST) Special Publication (SP) 800-63-2 (Aug. 2013), superseded by NIST SP 800-63-3 (June 2017), https://doi.org/10.6028/NIST.SP.800-63-3.

8 IRS, Form 14675, *Risk Assessment Tool and Form, Foreign Account Tax Compliance Act (FATCA) International Data Exchange System (IDES) Identity Proofing Requirements* (Jul. 18, 2017) (on file with TAS).

9 *Id*.

10 Most jurisdictions have yet to adopt transparent procedures for notifying taxpayers regarding international information exchanges; however, France and Kazakhstan do routinely notify affected taxpayers. Further, Australia has made significant strides toward the adoption of procedures to ensure transparency under most circumstances. *See* Ali Noroozi, *Taxpayer Rights: Privacy and Transparency*, 87 Tax Notes Int'l 2 141-145 (July 10, 2017). *See also* Inspector-General for Taxation, *Review into the Taxpayers' Charter and Taxpayer Protections* 117-128 (Dec. 2016).

- IRC § 1474(g)(3), requiring that, barring unique and compelling circumstances, taxpayers be informed prior to the transfer of their individual information pursuant to the terms of an IGA.

PRESENT LAW

In 2010, Congress enacted FATCA to address concerns that U.S. taxpayers were not fully disclosing the extent of financial assets held abroad.[11] Subject to various thresholds and exceptions, FATCA requires FFIs to report to the IRS information about financial accounts held by U.S. taxpayers, or by certain foreign entities in which U.S. taxpayers hold a substantial ownership interest.[12] Failure to do so can result in a 30 percent U.S. withholding tax on a broad range of payments.[13] In order to avoid this withholding, an FFI must report directly to the IRS on accountholders, or undertake reporting pursuant to IGAs that have been negotiated between the U.S. and the FFI's country of residence or organization.

Under a Model 1 IGA, FFIs provide accountholder information to their country's tax authority, which in turn transfers it to the IRS.[14] By contrast, under a Model 2 IGA, FFIs report directly to the IRS based on protocols negotiated between the U.S. and the FFI's country of residence.[15] To date, the U.S. has negotiated over 100 IGAs with foreign jurisdictions.[16]

Many Model 1 IGAs, specifically those that are "in force," also include reciprocity, in which the IRS provides information to a given foreign jurisdiction regarding accounts held in the U.S. by residents or citizens of the foreign country. When negotiating reciprocal IGAs with a reciprocal partner, the U.S. includes certain provisions specifically addressing data security.[17] These protections include safeguards aimed at ensuring that the data remains confidential and is used solely for tax purposes.[18] Further, reciprocal IGAs typically require the existence of an infrastructure facilitating timely, accurate, and confidential information exchanges.[19] Only after the U.S. is satisfied that the reciprocal partner has appropriate protections in place does the data transfer take place.[20]

Further, the IRS has taken several steps to mitigate the risk of data breaches resulting from reciprocal agreements, including:

- Establishing long-term relationships with partner countries' points-of-contact;

---

11 Hiring Incentives to Restore Employment Act, Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010) (adding IRC §§ 1471-1474; 6038D).

12 U.S. Department of Treasury, *Foreign Account Tax Compliance Act (FATCA)* (Apr. 11, 2018), https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.

13 IRC § 1471(a).

14 IRS, FATCA *Information for Governments* (Feb. 17, 2018), https://www.irs.gov/businesses/corporations/fatca-governments.

15 *Id*.

16 U.S. Department of Treasury, *Foreign Account Tax Compliance Act (FATCA)* (Apr. 11, 2018), https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx. Specifically, there are over 100 intergovernmental agreements (IGAs) that are either "in force" or "treated as in effect." An IGA is "in force" when the jurisdiction has enacted implementing legislation for its foreign financial institutions (FFIs) to document and report under the IGA.

17 Department of Treasury, *Model 1A IGA Reciprocal, Preexisting TIEA or DTC* (Nov. 30, 2014), Article 3.7-9.

18 *Id*. See, for example, paragraph 8, which in relevant part, states, "Following entry into force of this Agreement, each Competent Authority shall provide written notification to the other Competent Authority when it is satisfied that the jurisdiction of the other Competent Authority has in place (i) appropriate safeguards to ensure that the information received pursuant to this Agreement shall remain confidential and be used solely for tax purposes, and (ii) the infrastructure for an effective exchange relationship…"

19 Department of Treasury, *Model 1A IGA Reciprocal, Preexisting TIEA or DTC* (Nov. 30, 2014), Article 3.7-9.

20 *Id*.

- Encrypting outbound data files using encryption standards common across all sensitive government uses;[21]
- Providing partner countries with unique private keys to open data transmissions; and
- Undertaking on-site reviews of partner countries to ensure that their safeguards are sufficient and will be in place to protect the incoming data.[22]

Within the U.S., federal agencies, including the IRS, are required to conform to cybersecurity guidelines set forth by NIST.[23] Likewise, Congress enacted a variety of statutes protecting the confidentiality and use of taxpayer data, both inside and outside of the IRS.[24]

REASONS FOR CHANGE

Notwithstanding significant efforts to ensure the confidentiality and appropriate use of taxpayer data in implementing IGAs, the IRS is unable to comply with NIST standards when transferring that information to reciprocal partners. Likewise, it cannot control what a country does with taxpayer data once the information transfer is complete. These exposures, particularly noncompliance with NIST guidelines, prompted the IRS to undertake an assessment regarding identity proofing and e-authentication with respect to foreign users.[25] Where outbound data transfers to partner countries are concerned, the IRS concluded that the impact of a data breach would be "high," but that the likelihood of such a breach actually occurring was "very low."[26] Therefore, the IRS assessed the overall risk stemming from this deficiency as "low."[27]

That being said, the exposure to the IRS in the event of data theft or misuse occurring either in transfer or after receipt by the foreign jurisdiction is primarily reputational. On the other hand, the true impact of such a data breach would be experienced by the taxpayers whose information is compromised. They could, among other things, be the victims of identity theft or the targets of persecution within foreign jurisdictions. The consequences could range from substantial inconvenience to serious economic damage to harassment and even physical danger.

Nevertheless, taxpayers who are citizens or residents of a foreign jurisdiction have no voice in the U.S.'s decision to pursue an IGA with a foreign jurisdiction, or in the terms that are ultimately negotiated. Likewise, once such an IGA is put into place, these taxpayers may not even know that their account

---

21 Specifically, the IRS uses Advanced Encryption Standard (AES) encryption, which is the standard recommended by National Institute of Standards and Technology (NIST) for use by all government agencies, including for the protection of top-secret data by the National Security Agency. *See* NIST, *Cryptographic Standards and Guidelines* (Oct. 10, 2018), https://csrc.nist.gov/projects/cryptographic-standards-and-guidelines/archived-crypto-projects/aes-development.

22 IRS, Form 14675, *Risk Assessment Tool and Form, Foreign Account Tax Compliance Act (FATCA) International Data Exchange System (IDES) Identity Proofing Requirements* (July 18, 2017) (on file with TAS).

23 NIST SP 800-63-2 (Aug. 2013), superseded by NIST SP 800-63-3 (June 2017), https://doi.org/10.6028/NIST.SP.800-63-3.

24 *See, e.g.*, IRC § 7213, 6103.

25 IRS, Form 14675, *Risk Assessment Tool and Form, Foreign Account Tax Compliance Act (FATCA) Qualified Intermediaries (QI) and Financial Institution Registration* (July 18, 2017) (on file with TAS); IRS, Form 14675, *Risk Assessment Tool and Form, Foreign Account Tax Compliance Act (FATCA) International Data Exchange System (IDES) Identity Proofing Requirements* (July 18, 2017) (on file with TAS).

26 IRS, Form 14675, *Risk Assessment Tool and Form, Foreign Account Tax Compliance Act (FATCA) International Data Exchange System (IDES) Identity Proofing Requirements* (July 18, 2017) (on file with TAS).

27 *Id.*

information is the subject of a data transfer.[28] If impacted taxpayers were allowed to comment on potential IGAs, they could make the U.S. aware of circumstances that perhaps were unknown or undervalued by those participating in the negotiations. Moreover, once informed that data transfers to a foreign jurisdiction were under consideration, taxpayers would have an opportunity to minimize risks to their property and physical safety. This public notice would also give affected taxpayers the chance to address any erroneous information or noncompliance that should be remedied. Further, it would provide them with the opportunity to mitigate the potential impact flowing from misinterpretation or improper re-disclosure of the information by the foreign jurisdiction.

The public notice should explain the safety measures that have been taken to ensure that taxpayer data will be transferred securely and used properly. This explanation will likely provide taxpayers with some reassurance. Nevertheless, the negative consequences of a data breach ultimately fall on the taxpayer, and the risk of damage increases exponentially with every additional country receiving the taxpayer's information.

Of course, unique circumstances may occasionally arise in which individual notification could jeopardize ongoing criminal investigations in either the U.S. or the foreign jurisdiction. In order to address such situations, procedures should be developed to govern the evaluation of this risk and the determination of when nondisclosure to specific individuals is warranted.

EXPLANATION OF RECOMMENDATION

Congress should amend IRC § 1474 to require announcement of IGAs for notice and comment by taxpayers; specification of the extent to which the proposed IGA partner jurisdiction conforms with the cybersecurity standards to which U.S. federal agencies are held and the taxpayer privacy standards which govern the IRS; and, barring unique and compelling circumstances, notification to taxpayers prior to the transfer of their individual information pursuant to the terms of an IGA. By doing so, Congress would give taxpayers the opportunity to voice specific concerns to be considered prior to implementation of an IGA and would allow taxpayers to undertake steps to mitigate the potential risk flowing from the theft or misuse of data during or after electronic transfer of that data to foreign jurisdictions.

28 The possibility that data may be provided under a Model 1 IGA is disclosed in various places, including on the face of the current Form W-8BEN, *Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)*, and in the current instructions to Form W-8BEN-E, *Certificate of Status of Beneficial Owner for United States Tax Withholding and Reporting (Entities)*. Nevertheless, these generalized statements function more as broad caveats than as targeted notifications.

LR #7 FOREIGN ACCOUNT REPORTING: Authorize the IRS to Compromise Assessed FBAR Penalties It Administers

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

PROBLEM

In addition to the administration and enforcement of the penalties contained in the Internal Revenue Code (IRC), the IRS has been delegated the authority to enforce Foreign Bank and Financial Accounts (FBAR)[2] reporting requirements and assess FBAR penalties under Title 31 of the United States Code (U.S.C.).[3] FBAR penalties fall under Title 31 and not under any provisions of the IRC (also referred to as Title 26), which the IRS typically would have the authority to administer.

For Title 26 liabilities, IRC § 7122 authorizes the IRS to compromise any civil or criminal case arising under the Internal Revenue laws (prior to referral of the case to the Department of Justice (DOJ)).[4] Although, the IRS has the authority to compromise assessed tax liabilities under IRC § 7122, the IRS does not have the authority to compromise assessed Title 31 FBAR penalties.[5] Assessed FBAR penalties which exceed $100,000 can only be compromised by the Department of Justice, while those under that amount can be compromised by the Bureau of Fiscal Service (BFS).[6] In situations when the IRS assesses both tax liabilities, including penalties under the IRC and the FBAR penalties stemming from

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 *See* Currency and Foreign Transactions Reporting Act, Pub. L. No. 91-508, Title II, 84 Stat. 1114, 1118 (1970) (codified as amended at 31 U.S.C. §§ 321, 5311–5314, and 5316–5322). Prior to 2003, the Foreign Bank and Financial Accounts (FBAR) reporting requirements were enforced by the Financial Crimes Enforcement Network (FinCEN). In 2003, to increase compliance, FinCEN delegated its FBAR enforcement authority to the IRS. The Director of FinCEN delegated the authority to the IRS to assess FBAR liabilities under Title 31. Specially, the IRS was delegated with assessment of 31 U.S.C. § 5314, 31 C.F.R. § 1010.350, 31 C.F.R. § 1010.306, and 31 C.F.R. § 1010.420, including, with respect to these provisions, the authority to assess and collect civil penalties under 31 U.S.C. § 5321 and 31 C.F.R. § 1010.820 and to take any other action reasonably necessary for the enforcement of these and related provisions. *See* Memorandum of Agreement Between FinCEN and the IRS (Apr. 10, 2003). *See also* 31 C.F.R. § 1010.810(g); *Memorandum of Agreement and Delegation of Authority for Enforcement of FBAR Requirements*, Internal Revenue Manual (IRM) Exhibit 4.26.1-3, *FBAR Delegation to IRS* (Apr. 5, 2011).

3 31 U.S.C. § 5318(a) provides the Secretary of the Treasury with authority to administer provisions of the Bank Secrecy Act (BSA).

4 IRC § 7122. IRS Form 656, *Offer in Compromise* (Rev. Mar. 2018), is the required form for an offer in compromise (OIC).

5 There is a *de minimus* exception which allows the head of an executive, judicial, or legislative agency to compromise assessed FBAR penalties up to $100,000. 31 U.S.C. § 3711(a)(2). However, this authority to compromise falls under the authority of the Bureau of Fiscal Service (BFS). *See* 31 C.F.R. § 902.1. *See also* IRM Exhibit 4.26.1-3, *FBAR Delegation to IRS* (Apr. 5, 2011). Prior to assessment, the IRS may compromise the FBAR penalty. For pre-assessment procedures, see IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)* (Nov. 6, 2015).

6 31 U.S.C. § 3711(a)(2). *See also* 31 C.F.R. § 902.1.

the same conduct, and it considers an offer in compromise (OIC) for tax liabilities, it cannot consider compromising FBAR penalties to achieve a final, one-stop, complete resolution for the taxpayer.[7]

After the IRS makes assessments under both Title 26 and Title 31, if a taxpayer seeks to compromise his or her Title 26 and Title 31 assessments, the following steps would have to occur:

1. The taxpayer would submit an OIC to the IRS. This OIC would be limited to the Title 26 taxes and penalties. Any amounts owed for the Title 31 FBAR penalty cannot be considered by the IRS.
2. While the IRS is considering the OIC, all debt-collection activity on the Title 26 assessment would be held in abeyance.[8] However, the government, through BFS, can continue collecting the Title 31 FBAR penalty.[9]
3. BFS may eventually refer the Title 31 FBAR penalty to DOJ.[10]
4. The Attorney General or delegate may compromise both the Title 26 and Title 31 case after referral to DOJ for prosecution or defense.[11] However, if in the meantime, the IRS has accepted the OIC, DOJ would only be able to consider a compromise for the FBAR assessments.[12]

Affected taxpayers need to complete multiple steps to compromise all liabilities (FBAR and tax), which increases taxpayer burden not limited to costs of representation and undermines the taxpayer's *right to finality* and the *right to a fair and just tax system*. This process is also inefficient for the government as it may create rework at different stages for several government agencies—the IRS, BFS, and DOJ.

EXAMPLE

In 2015, Taxpayer A, a citizen of the Republic of India, co-inherited an offshore account in India from his parents, along with his two brothers. Taxpayer A currently is a U.S. legal permanent resident (green card holder) residing in the U.S. but his two brothers, citizens of the Republic of India, live and work in New Delhi, India. Taxpayer A's parents owned a Swiss bank account in the amount of $1,000,000 and named all three children as beneficiary owners. When the parents passed away all three brothers made withdrawals from the account, which earned six percent in interest per annum. In 2015, Taxpayer A made several withdrawals totaling $200,000 while his brothers withdrew the remaining balance and closed the account. In 2015, the account accrued $60,000 in interest.

Taxpayer A failed to report the foreign financial account on the FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), and Form 8938, *Statement of Specified Foreign Financial Assets*. He also failed to indicate he had a beneficial interest in a foreign account on Schedule B of his U.S. federal income tax return for tax year (TY) 2015.

After an audit in 2018, the IRS determined that Taxpayer A acted willfully and assessed a willful FBAR penalty of $500,000 for TY 2015, 50 percent of the maximum account value during that year. It also attributed the interest of $60,000 to Taxpayer A's income for TY 2015 which resulted in an additional

7 IRM 5.21.6.7, *Collection of FBAR Penalties* (Feb. 18, 2016).
8 *See* IRC § 7122; 26 C.F.R. § 301.7122-1.
9 *See* IRM 5.21.6.7, *Collection of FBAR Penalties* (Feb. 18, 2016).
10 *See* 31 C.F.R. §§ 285.1-8, 285.11-13.
11 IRC § 7122(a); 31 U.S.C. § 3711(a)(2).
12 *See* 31 U.S.C. § 3711.

tax, interest and accuracy-related penalties of about $9,500. The IRS also assessed the penalty for the failure to file the Form 8938, *Statement of Specified Foreign Financial Assets,* of $10,000 under IRC § 6038D(d)(1).[13]

Taxpayer A experienced economic hardship along with significant medical expenses. Taxpayer A has approached the IRS, seeking to compromise both his tax liabilities and the assessed FBAR penalty. The IRS does not have a statutory authority to compromise the Title 31 assessment. Therefore, Taxpayer A submits a doubt as to collectibility OIC to the IRS to compromise the Title 26 tax debt ($19,500 for TY 2015). After taking into consideration his allowable living expenses, the IRS accepts Taxpayer A's monthly payments, under the terms of the OIC, consisting of $125.00 per month for three years. Meanwhile, because Taxpayer A has not been able to afford any payments on his FBAR penalty of $500,000 (the Title 31 FBAR penalty), the IRS referred that debt to BFS. Taxpayer A approaches BFS to compromise the debt and BFS refers him to DOJ as it does not have authority to compromise an amount above $100,000. Taxpayer A gives up on finding a settlement with DOJ because he is afraid it would jeopardize his OIC with the IRS.

When BFS starts to garnish his wages and offsets a portion of his social security benefits[14] in payment of the FBAR penalty (*i.e.*, $500,000 for TY 2015), Taxpayer A defaults on his OIC and the total tax liability (*i.e.*, $19,500 for TY 2015) plus interest and penalties is reinstated.

RECOMMENDATION

To promote the taxpayers' *right to finality* and *the right to a fair and just tax system*, and to improve efficiency of IRS's administration of the FBAR penalty, the National Taxpayer Advocate recommends that Congress amend IRC § 7122(a) to allow the IRS to compromise the FBAR penalties assessed by the IRS under U.S.C. Title 31.

PRESENT LAW

IRC § 7122 authorizes the Secretary to enter into an agreement with a taxpayer that settles the taxpayer's tax liabilities for less than the full amount owed, as long as the liabilities have not been referred to DOJ.[15] Such an agreement is known as an "offer in compromise" (OIC). Treasury regulations provide that the IRS may compromise liabilities to the extent there is doubt as to liability, doubt as to collectibility, or to promote effective tax administration.[16] The regulations further define these terms and provide instances when compromise is appropriate. The IRS has statutory authority to compromise any civil or criminal case arising under the Internal Revenue laws prior to referral to DOJ for prosecution or defense. The Internal Revenue laws are those laws contained in Title 26 of the United States Code.[17]

---

13 The Foreign Account Tax Compliance Act (FATCA) added IRC § 6038D, which requires U.S. citizens, resident aliens, and certain non-resident aliens to file Form 8938, *Statement of Specified Foreign Financial Assets*, with their federal income tax returns to report foreign assets exceeding specified thresholds. *See* Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

14 *See* 31 C.F.R. §§ 285.4(e) and 285.11(d).

15 IRC § 7122(a).

16 Treas. Reg. § 301.7122-1(b).

17 *See generally* IRC §§ 1–9834.

The requirement to report foreign bank and financial accounts was added to the United States Code in 1970 as part of the "Currency and Foreign Transactions Reporting Act of 1970," which came to be known as the "Bank Secrecy Act" or "BSA."[18] Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Department of the Treasury each year.[19] Individuals required to file FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR), who fail to properly file this form, may be subject to civil monetary penalties under 31 U.S.C. § 5321.

The BSA was codified in Title 31.[20] 31 U.S.C. § 5318(a) provides the Secretary of the Treasury with authority to administer provisions of the BSA. The Secretary of the Treasury delegated the authority to administer civil compliance with Title II of the BSA to the Director, FinCEN.[21] While FinCEN retains its rule-making authority for FBAR, it re-delegated civil FBAR enforcement authority to the IRS.[22] The civil FBAR enforcement authority includes the assessment and collection of civil FBAR penalties.[23] Title 31 FBAR liabilities are not tax debts, which would fall under Title 26.[24]

REASONS FOR CHANGE

In situations when the IRS assesses both tax liabilities, including penalties under the IRC, and the FBAR penalties stemming from the same conduct, and it considers an OIC for tax liabilities, it cannot consider compromising FBAR penalties to achieve global resolution.[25]

After the IRS makes assessments under both Title 26 and Title 31, if a taxpayer seeks to compromise both assessments, as noted earlier, the taxpayer will need to deal with two or sometimes three different government agencies.[26] First, the taxpayer would submit an OIC to the IRS to compromise his or her tax liabilities, which, however, would not preclude BFS from collecting the Title 31 FBAR penalty during the pendency of the OIC. Then the taxpayer would need to separately request BFS to consider a compromise of the FBAR penalties if the assessment does not exceed the $100,000 threshold,[27] or to request both BFS and the IRS to refer their respective assessments to DOJ if the FBAR assessment

18 A civil penalty not to exceed $10,000 may be imposed against anyone who violates or causes a violation of 31 U.S.C. § 5314 and its regulations, including the failure to file an FBAR. 31 U.S.C. § 5321(a)(5)(A)-(B). For willful violations, the maximum penalty is the greater of $100,000 or 50 percent of the amount of the transaction or the balance in such account at the time of the violation. 31 U.S.C. § 5321(a)(5)(C). *See also* IRM 4.26.16, *Report of Foreign Bank and Financial Accounts (FBAR)* (Nov. 6, 2015).

19 31 C.F.R. § 1010.350.

20 31 U.S.C. §§ 5311–5314, 5316–5332.

21 *See* Memorandum of Agreement Between FinCEN and the IRS (Apr. 10, 2003). *See also* 31 C.F.R. § 1010.810(g). IRS Criminal Investigation (CI) has authority to enforce the criminal provisions of the BSA.

22 *See* Memorandum of Agreement and Delegation of Authority for Enforcement of FBAR Requirements, available in IRM Exhibit 4.26.1-3, *FBAR Delegation to IRS* (Apr. 5, 2011).

23 *Id.*

24 The FBAR requirements under 31 U.S.C. § 5311 et seq. are separate from the requirements to report income from accounts on the relevant tax returns under Title 26. For more information distinguishing these two requirements, see IRS, *Comparison of Form 8938 and FBAR Requirements* (July 17, 2018), http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements.

25 IRM 5.21.6.7, *Collection of FBAR Penalties* (Feb. 18, 2016).

26 If the FBAR assessment is under $100,000, then the taxpayer will have to deal with two agencies—IRS and BFS. If the FBAR assessment is $100,000 or more, then it is possible that three agencies will be involved—IRS, BFS, and Department of Justice (DOJ). BFS is involved if the debt is referred to the agency and BFS is taking collection action. BFS, however, will not be involved in the compromise process, though, since only DOJ will have authority at that point. *See* 31 C.F.R. §§ 285.1-8, 285.11-13. *See also* IRC § 7122(a); 31 U.S.C. § 3711(a)(2).

27 This amount is excluding interest. *See* 31 U.S.C. § 3711(a)(2).

exceeds the threshold. Eventually once the taxpayer's case reaches DOJ, the Attorney General or delegate may compromise both tax and FBAR assessments. However, if, in the meantime, the IRS has accepted the OIC, DOJ would be able only to consider a compromise for the FBAR liability.[28] This process involves multiple steps which may duplicate efforts by the government and cause additional burden for taxpayers, including representation costs, extensive delays, and uncertainty.

Granting the IRS the authority to compromise Title 26 and Title 31 assessments would benefit both the government, as a whole, and taxpayers seeking to compromise their debts. The government benefits because one agency has jurisdiction over the whole process and a taxpayer's individual circumstances will be considered in their entirety when an OIC is submitted to the IRS.

EXPLANATION OF RECOMMENDATION

The recommendation would allow the IRS to compromise FBAR debt it assessed against a taxpayer along with tax liabilities under the IRC. Adding language in IRC § 7122(a) to allow the IRS to compromise FBAR penalties it has assessed would be a cost-effective fix for the government and taxpayers alike.

This legislative change would not create a conflict with the statutory framework for compromise of nontax debts under 31 U.S.C. § 3711.[29] Instead, it would be in line with the IRS's existing authority to compromise any civil or criminal penalties assessed arising under the Internal Revenue laws, prior to referral of the case to DOJ. For Title 26 tax liabilities, IRC § 7122 currently authorizes the IRS to compromise any civil or criminal penalties assessed in cases arising under the Internal Revenue laws *prior* to referral of the case to DOJ. Similarly, if adopted, this legislative change would authorize the IRS to compromise Title 31 FBAR penalties it has assessed but *only prior* to referral of the case to DOJ. DOJ would retain jurisdiction to compromise both tax and nontax (FBAR penalty) liabilities after a case is referred to it by the IRS. This legislative change would allow the IRS to evaluate the taxpayer's financial situation and compromise all tax liabilities and the assessed FBAR penalties stemming from the same conduct, under the principles set forth in IRC § 7122, in one setting. The FBAR compromise authority would allow the IRS to provide taxpayers with a consistent, comprehensive resolution for all liabilities assessed by the IRS, the agency most familiar with the taxpayer's circumstances; thereby also conserving government resources.

28 *See* 31 U.S.C. § 3711.

29 *Id.*

LR #8

TAX WITHHOLDING AND REPORTING: Improve the Processes and Tools for Determining the Proper Amount of Withholding and Reporting of Tax Liabilities

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*

PROBLEM

Passage of the Tax Cuts and Jobs Act resulted in a variety of changes that caused many taxpayers to adjust the information furnished to employers so that relatively accurate withholding at source could be undertaken.[2] To assist in this process, the IRS is developing a redesigned Form W-4, *Employee's Withholding Allowance Certificate*, that will likely be available in 2020.[3] Efforts to achieve accurate withholding have generated a range of concerns, including complexity, taxpayer burden, and employee privacy.[4] These issues arise because, unlike in many other countries, such as New Zealand, the U.S. tax system requires employees to navigate an often-confusing and difficult process to provide employers with their personal information, including other sources of income and marital status, so that the correct amount of tax can be withheld.[5]

An additional challenge arises from the circumstance that, in the U.S., withholding is primarily applied against wage income.[6] Thus, taxpayers earning other income, such as interest, dividends, and payments collected as an independent contractor, must factor in those earnings when determining how much should be withheld from their wages in order to meet their overall tax obligations. Such an effort can be both complex and frustrating, and inevitably leads to the disclosure of all such information to employers. Other countries have implemented solutions to these problems, however, that not only preserve employee privacy, but that, in the case of the U.K., allow approximately two-thirds of all taxpayers to end each year having already fully and accurately satisfied their tax liabilities.[7]

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 H.R. 1, Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

3 *See* IRS, *IRS Statement on Form W-4* (Nov. 5, 2018), https://www.irs.gov/newsroom/irs-statement-on-form-w-4.

4 Nina E. Olson, *As the IRS Redesigns Form W-4, Employee's Withholding Allowance Certificate, Stakeholders Raise Important Questions*, NTA Blog (Nov. 29, 2018), https://taxpayeradvocate.irs.gov/news/nta-blog-as-the-irs-redesigns-form-w-4-employee-s-withholding-allowance-certificate-stakeholders-raise-important-questions?category=Tax News.

5 *See* Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

6 For an in-depth discussion of this issue and for the basis underlying the National Taxpayer Advocate's first two recommendations herein, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

7 Louise Eccles, *Millions are Unnecessarily Filling in Tax Returns: Quarter of Those Filing Forms Owe Less than £50 or Nothing at All*, Daily Mail (Jun. 15, 2015), http://www.dailymail.co.uk/news/article-3125675/Millions-needlessly-filling-tax-returns-Quarter-completing-forms-owe-50-all.html. *See also* William J. Turnier, *PAYE as an Alternative to an Alternative Tax System*, 23 Va. Tax Rev. 205, 212 (Summer 2003).

Another problem currently, though unnecessarily, confronting taxpayers, is their inability to easily access and utilize their own data existing within IRS systems. Related difficulties include the restrictions surrounding free electronic filing (e-filing) of tax returns and the limited usefulness of the Free File Fillable Forms (Fillable Forms) available for preparation of electronic returns.[8] Even though the IRS already receives year-end information reports, such as Forms W-2, *Wage and Tax Statement*, and 1099-MISC-NEC, *Miscellaneous Income (Nonemployee Compensation)*, taxpayers and their authorized tax return preparers are unable to access their data directly from the IRS by means of an online account.[9] As a result of this inability, taxpayers are prevented from importing the data on these forms into tax return preparation software, or into Fillable Forms that themselves could perform the math necessary to calculate tax liabilities or refunds.[10] Accordingly, U.S. taxpayers are provided with suboptimal processes and tools for determining not only the withholding, but also the reporting of tax liabilities, shortcomings that prevent taxpayers from receiving the simplicity, privacy, and accuracy they have a right to expect.

EXAMPLE

Jane works full-time for Retailer and earned $25,000 from her employer during the 2018 tax year. Retailer has a policy that strongly discourages other types of outside employment. Nevertheless, Jane, who has a family to support, drives for a rideshare company in her off-hours, earning an additional $10,000 during the year.

Jane does not want Retailer to find out about her outside employment, so she does not report it as an additional source of income on the Form W-4 she submits to Retailer. Confused by the IRS withholding calculator and afraid of indirectly indicating an additional income source, she does nothing at all with respect to the ridesharing income.[11] As a result, by the end of 2018, Jane is substantially under-withheld. In early 2019, Jane attempts to prepare her 2018 tax return using software that is part of Free File, Inc., which she learned about through IRS.gov. Although she intends to comply with her tax obligations, Jane is misled by the software's emphasis on obtaining the "maximum refund" and omits her rideshare income reflected on her Form 1099. Ultimately, the IRS identifies the omission from income and Jane is not only subjected to an additional income tax liability, but to the failure to pay penalty because the IRS did not accept her explanation that her omission was made in good faith and that she should receive reasonable cause relief.[12]

8 For a more in-depth discussion of the IRS Free File Program, see Most Serious Problem: *Free File: The IRS's Free File Offerings Are Underutilized, and the IRS Has Failed to Set Standards for Improvement*, *supra*.

9 *See* Legislative Recommendations: It *Modernization: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan that Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party*, *supra*; National Taxpayer Advocate 2017 Annual Report to Congress 36-48.

10 *See* Most Serious Problem: *Free File: The IRS's Free File Offerings Are Underutilized, and the IRS Has Failed to Set Standards for Improvement*, *supra*.

11 *See* IRS, *IRS Withholding Calculator* (Dec. 11, 2018) https://www.irs.gov/individuals/irs-withholding-calculator.

12 *See* IRC § 6651(a)(3).

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress enact legislation directing the Treasury Department, in consultation with the IRS and the National Taxpayer Advocate, to analyze and report on the feasibility of and steps necessary for:

1. Adopting an IRS-determined withholding code as an alternative to the Form W-4 approach currently utilized in U.S. tax administration;
2. Expanding withholding at source to encompass not only wages, but taxable interest, pensions, dividends, capital gains, Individual Retirement Arrangement (IRA) income, unemployment, and eventually certain earnings as an independent contractor; and
3. Furnishing information return data to taxpayers electronically for direct importation into tax return preparation software or for provision to authorized tax return preparers.

PRESENT LAW

Simple Withholding Is Workable, but Limited

The most basic form of Pay-As-You-Earn (PAYE) tax collection is simple withholding, which is the approach applied in the U.S. Under that system, employers paying wages for services performed by employees are required to deduct and withhold Social Security, Medicare, and income taxes from those wages.[13] Thereafter, employers are obligated to remit these taxes to the IRS.[14] PAYE was implemented as a revenue collection mechanism during World War II, and has operated in roughly the same form ever since.[15] Although this system has proven effective and durable insofar as it goes, it is also overly-complex, insufficiently private, and unduly imprecise for 21st century tax administration.

Under the U.S.'s simple withholding system, taxpayers provide their employers with a Form W-4 detailing, among other things, their marital status, elected allowances, and any additional amounts they would like withheld. Withholding is then undertaken from wage income on a paycheck-by-paycheck basis. Percentage adjustments are automatically made to account for the amount of earnings within each pay period, but these adjustments are too generalized to result in accurate withholding for many taxpayers.[16] Moreover, earnings from other sources, such as interest, dividends, capital gains, and self-employment income, are not subject to withholding.

As a result, a year-end tax reconciliation is required to compare the amounts collected via withholding against the taxpayer's aggregate annual tax liability. This reconciliation, which in the U.S. is implemented through a post-year-end tax return filing requirement imposed on taxpayers, then generates a tax refund, a tax liability, or no payment from either the government or the taxpayer depending on the outcome.[17]

---

13 *See* IRC §§ 3101, 3102(a) and 3402(a).

14 IRC § 3403.

15 Pub. L. No. 68, Ch. 120, 57 Stat. 126 (1943). For a discussion of the historical evolution of the U.S. system of tax administration, see National Taxpayer Advocate 2011 Annual Report to Congress 1-150 (Study: *From Tax Collector to Fiscal Automaton: Demographic History of Federal Income Tax Administration, 1913-2011*).

16 IRS Notice 1036 (Dec. 2018).

17 IRC § 6012.

Other Countries Have Adopted an Expanded PAYE in Beneficial Ways

Taxpayers and policymakers in other countries have similar concerns regarding privacy and complexity as those expressed with respect to the U.S. withholding system. One antidote to some of these ills has been to route taxpayer information and withholding determinations through the tax authority, rather than through the employer.

For example, in New Zealand, withholding codes are obtained from the tax authority by employees and then forwarded by employees to their employers.[18] These withholding codes determine the amount of tax to be deducted from gross wages and salaries and remitted by employers to the tax authority.[19] The withholding codes take into account the type of employment, the number of jobs held, and the employee's entitlement to various rebates and deductions.[20] Among other things, the withholding codes factor in taxpayers' eligibility for various benefits, such as a credit for people earning between $24,000 and $48,000, families with minor dependents, and those possessing student loans.[21] Further, employees can apply to the tax authority for a special withholding code certificate reflecting unique situations, such as previously accruing losses eligible for deduction.[22]

Taxpayers obtain a withholding code by answering an anonymous questionnaire available on the tax authority's website.[23] The result of these questions generates a code corresponding to a series of potential circumstances (*e.g.*, one employer, income of $75,000, one minor dependent). Thereafter, taxpayers furnish the applicable withholding code to their employers.[24] If taxpayers fail to do so, withholding is instead applied at a higher-than-normal default rate of 45 percent.[25] Anytime taxpayers' circumstances change, they can return to the tax authority's website and obtain a revised withholding code, which in turn they forward to their employer. Likewise, if the tax authority determines that taxpayers are using an incorrect withholding code, it will send them a letter asking them to return to the website and update the applicable withholding code.[26]

The use of withholding codes protects taxpayer privacy in that employers have no transparency into underlying taxpayer information. Employers simply receive a code that tells them how much to withhold and remit each pay period. They have no knowledge regarding the circumstances of employees that cause a given code to be generated or revised. Further, employers are spared the burden of processing multiple Forms W-4 and protecting the private tax information with which they are entrusted. Rather, they can undertake withholding based on a specific, government-issued code on which they can rely and that minimizes the possibility of harmful data breaches.

---

18 New Zealand Inland Revenue, *What is my tax code?* (Mar. 31, 2017) http://www.ird.govt.nz/contact-us/topfive/four/tax-code-index.html?id=201711MegaMenu.

19 *Id*.

20 *Id*.

21 New Zealand Inland Revenue, *Work Out Your Tax Code* (Dec. 4, 2015) http://www.ird.govt.nz/how-to/taxrates-codes/workout/; New Zealand Inland Revenue, *Independent Earner Tax Credit* (July 20, 2017) http://www.ird.govt.nz/income-tax-individual/tax-credits/ietc/?id=201512TaxRateCalculator.

22 International Bureau of Fiscal Documentation (IBFD), New Zealand – Country Analysis 1. Individual Income Tax (Oct. 1, 2017) 1.10.3, *Withholding taxes*.

23 New Zealand Inland Revenue, *What is my tax code?* (Mar. 31, 2017) http://www.ird.govt.nz/contact-us/topfive/four/tax-code-index.html?id=201711MegaMenu.

24 *Id*.

25 IBFD, New Zealand – Country Analysis 1. Individual Income Tax (Oct. 1, 2017) 1.10.3.1, *Employment Income*.

26 New Zealand Inland Revenue, *What is my tax code?* (Mar. 31, 2017) http://www.ird.govt.nz/contact-us/topfive/four/tax-code-index.html?id=201711MegaMenu. For a more in-depth discussion of the New Zealand tax system and the use of withholding codes, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

Another approach aimed at increasing the simplicity and accuracy of withholding at source is to expand the scope of PAYE itself. In the U.K., for instance, PAYE is not only applied to a broader range of income, but is more nimble than in the U.S. As technology improved, the U.K. sought to accommodate changing work patterns and increase the precision and efficiency of tax collection by updating PAYE. In 2009, the U.K. created the National Insurance and PAYE Service (NPS) to compile and maintain in a single location records relating to earnings, tax, and National Insurance.[27] Then, in 2013, the U.K. began requiring most employers to report PAYE income tax information to the tax authority in real time.[28] The ability to maintain and access a single taxpayer record in real time allows for more accurate and efficient tax determinations and collections throughout the year, while also facilitating a new benefits payment system, the Universal Credit.[29]

In order to cover the maximum number of taxpayers as comprehensively as possible under its PAYE system, the U.K. takes some different approaches than those adopted by the U.S. In particular, U.K. taxpayers file and are taxed individually regardless of their family status.[30] By contrast, the U.S.'s retrospective approach to administering tax benefits, such as the Earned Income Tax Credit, with reference to the ongoing existence of the family unit, places significant limitations on the number of tax returns to which a PAYE system could be applied.[31]

In the U.K., withholding at source occurs on a range of income beyond wage earnings, including royalties, pensions, and annuities.[32] Additionally, certain other categories of income, such as capital gains under an £11,700 threshold and dividends under a £5,000 threshold, that do not easily lend themselves to a PAYE system of tax collection, are exempted from taxation.[33] Moreover, beginning with a 2013 phase-in, the U.K. has generally administered benefits and support programs on a direct payment basis, rather than through the tax system.[34] These adjustments make it easier for PAYE to operate very broadly and to collect the full annual tax liability from the majority of U.K. taxpayers during the course of the year.

---

27 David Gauke, *PAYE Story*, Tax'n (Sept. 21, 2011), http://www.taxation.co.uk/taxation/Articles/2011/09/21/29571/paye-story. Note, National Insurance in the U.K. is similar in concept to Social Security in the U.S.

28 Jessica Winch, *Q&A: Why Your PAYE is Switching to 'Real Time,'* Telegraph, (Apr. 5, 2013), http://www.telegraph.co.uk/finance/personalfinance/tax/9973700/QandA-Why-your-PAYE-tax-is-changing-to-real-time.html. As used herein, the term "real time" means contemporaneously or instantaneously, as the case may be.

29 *Id*.

30 William G. Gale and Janet Holtzblatt, *On the Possibility of a No-Return Tax System*, L Nat'l Law Tax J. no. 3, 1997, 475, 477-479.

31 National Taxpayer Advocate 2016 Annual Report to Congress 325-357. For a more in-depth discussion of this issue, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems As a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

32 IBFD, United Kingdom - Country Analysis 1. Individual Income Tax (Jan. 1, 2017) 1.3.3, *Pension income*; 1.10.3, *Withholding taxes*.

33 Her Majesty's Revenue and Customs (HMRC), *Capital Gains Tax*, https://www.gov.uk/capital-gains-tax/print (last visited Nov. 19, 2018); HMRC, *Dividends Allowance Factsheet* (Aug. 17, 2015). https://www.gov.uk/government/publications/dividend-allowance-factsheet/dividend-allowance-factsheet. *See also* IBFD, United Kingdom - Country Analysis 1. Individual Income Tax (Jan. 1, 2017) 1.3.3, *Pension Income*; 1.10.3, *Withholding taxes*.

34 Department for Work and Pensions, *Universal Credit Announced* (Oct. 5, 2010) https://www.gov.uk/government/news/universal-credit-introduced; Department of Work and Pensions, *Universal Credit and You* (Jul. 25, 2018) Sec. 4, https://www.gov.uk/government/publications/universal-credit-and-you/universal-credit-and-you-a#payments----how-when-and-where. For a more in-depth discussion of the U.K. PAYE system and similar systems applied in other countries, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

Free File Fillable Forms Are Available to U.S. Taxpayers, but Do Not Live Up to Their Potential

The IRS Restructuring and Reform Act of 1998 (RRA 98) required the IRS to work with private industry to increase e-filing, and set the goal of having 80 percent of all federal tax returns filed online by the year 2007.[35] Subsequently, the Bush Administration's EZ Tax Filing Initiative directed the IRS to create "a single point of access to free on-line preparation and electronic tax filing services provided by Industry Partners to reduce burden and costs to taxpayers."[36] The Bush Administration's original concept was that the IRS would develop its own digital Form 1040, *U.S. Individual Income Tax Return*, to be accessed through WhiteHouse.gov. IRS leadership, however, determined that the IRS did not have the capacity or resources to develop such a product.[37]

Instead, the IRS partnered with a consortium of private tax return preparation software companies now known as Free File, Inc (FFI).[38] In 2002, FFI agreed to provide low and middle income taxpayers free online return preparation services via an IRS.gov webpage.[39] The agreement allowed the software providers to determine the scope of their offerings, but obligated the IRS to assume oversight responsibilities.[40]

Beyond free tax return preparation services for low and middle income taxpayers, the National Taxpayer Advocate has long contended that the IRS should also provide all taxpayers, regardless of income, with a bare-bones digital version of the paper Form 1040, complete with fillable fields, links to instructions, and math and numeric transfer capacity, along with free e-filing.[41] In response to this advocacy, the 2009 Free File Memorandum of Understanding created Fillable Forms, a forms-based product designed by FFI to make electronic versions of IRS forms and schedules available to all taxpayers.[42]

Currently, the 12 members of FFI offer free federal tax return preparation software products to eligible taxpayers. For the 2018 tax year, taxpayers that have adjusted gross incomes (AGIs) of $66,000 or less are eligible to use Free File software, while taxpayers with AGIs greater than that amount can use Fillable

---

35 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105–206, § 2001(a)(2), 112 Stat. 685, 723 (1998). For a more in-depth discussion of the Free File Program that came about as a result of this legislation, see Most Serious Problem: *Free File: The IRS's Free File Offerings Are Underutilized, and the IRS Has Failed to Set Standards for Improvement*, *supra*. This Most Serious Problem also discusses Free File Fillable Forms, which are the subject of this Legislative Recommendation.

36 Presidential Initiatives: IRS Free File, https://georgewbush-whitehouse.archives.gov/omb/egov/c-1-3-IRS.html (last visited Dec. 12, 2018).

37 *See* Most Serious Problem: *Free File: The IRS's Free File Offerings Are Underutilized, and the IRS Has Failed to Set Standards for Improvement*, *supra*.

38 Treasury Department, *Treasury, IRS Announce New Efforts to Expand E-Filing* (Jan. 30, 2002), https://www.treasury.gov/press-center/press-releases/Pages/po964.aspx.

39 Free On-Line Electronic Tax Filing Agreement entered into between the IRS and the Free File Alliance, LLC (effective as of Oct. 30, 2002), https://www.irs.gov/pub/irs-utl/2002-free-online-electronic-tax-filing-agreement.pdf (hereinafter 2002 Free File Agreement).

40 2002 Free File Agreement at 3-4.

41 National Taxpayer Advocate 2012 Annual Report to Congress 232-250; National Taxpayer Advocate 2004 Annual Report to Congress 471-477 (Key Legislative Recommendation: *Free Electronic Filing for All Taxpayers*).

42 Fifth Memorandum of Understanding on Service Standards and Disputes Between the Internal Revenue Service and Free File Alliance, LLC (effective as of Oct. 20, 2009), https://www.irs.gov/pub/irs-utl/2009-fourth-ff-mou.pdf (hereinafter 2009 Free File MOU).

Forms.[43] These Fillable Forms, however, continue to fall short of the functionality and convenience envisioned by both the Bush Administration and the National Taxpayer Advocate.[44]

REASONS FOR CHANGE

Taxpayers and Employers Would Benefit From the Use of a Withholding Code

As explained above in the "Present Law" section, a number of countries, including New Zealand, have adopted a withholding code as a central aspect of their withholding system. The primary benefit of such an approach is that all of a taxpayer's tax information is protected from disclosure to the employer, while requiring no new disclosures to the tax authority. Basic personal information, such as marital status and other sources of income, will not be made available to the employer, at least not via operation of the income tax system. This wall of separation between employees' tax information and employers not only protects employees' privacy, but minimizes the risk of data breaches and charges that employers have misused personal information.

Further, the use of a withholding code, assuming the application of appropriate advances in technology embraced by other countries, can allow for real-time adjustments to the amount of periodic withholding undertaken by employers.[45] The ability to make such adjustments and the increased ease with which taxpayers can report changes in their circumstances allows for an easier and more precise collection of tax liabilities at source.

Additionally, although the provision of taxpayer information to the IRS for purposes of a withholding code determination would not necessarily guarantee simplicity, if properly implemented, such a process would be less cumbersome than redesign and subsequent use of the Form W-4. Moreover, the IRS could and should prioritize accessibility and ease of use by taxpayers when designing a withholding code interface through the use of a mobile-friendly version of the webpage and an automated telephone questionnaire. Further, the IRS could establish safeguards to help ensure that items which should be included in the withholding determination are actually reported and become part of the withholding code. Thus, the adoption of a withholding code, such as that used by New Zealand, would not only preserve privacy, but would be more straightforward for both taxpayers and employers.

An Expanded PAYE System Would Allow for More Accurate and Efficient Collection of Tax Liabilities at Source

Another mechanism for improving PAYE is to increase its coverage so that it can collect tax liabilities on income items other than wage earnings. Of the 147 million tax returns filed for tax year (TY) 2016, 62 percent reported only income fully captured by seven line items on IRS Form 1040.[46] Accordingly, a relatively large portion of the U.S. taxpayer population earns the vast majority of its income from a limited number of income sources, thus making expanded tax collection via withholding at source

43 *See Free File Software Offers*, https://apps.irs.gov/app/freeFile/jsp/index.jsp (last visited Oct. 10, 2018).

44 For example, truly effective Fillable Forms would, among other things, allow users to download tax forms to their personal computers as PDF files, print hard copies of any form or schedule, easily reference IRS publications, instructions, and tax tables via hyperlink, and contact a helpline to obtain troubleshooting assistance.

45 *See* Legislative Recommendations: *IT Modernization: Provide the IRS with Additional Dedicated, Multi-Year Funding to Replace Its Antiquated Core IT Systems Pursuant to a Plan that Sets Forth Specific Goals and Metrics and Is Evaluated Annually by an Independent Third Party*, *supra*.

46 TAS Research analysis of IRS Compliance Data Warehouse (CDW), Individual Returns Master File (IRTF), Tax Year (TY) 2016 returns. This percentage is based on all filers, not just nonitemizers.

potentially feasible. Figure 2.8.1 shows the incremental tax collection increases that could result from a PAYE regime expanded to cover the top seven sources of income for U.S. individual taxpayers.

FIGURE 2.8.1, Cumulative Buildup of PAYE TY 2016 Income Items[47]

Income type(s)	Number of nonitemizing tax returns	Incremental addition	Percentage of nonitemizing returns	Percentage of all tax returns
Wage only	59,300,000	59,300,000	45%	40%
Wage and/or interest	65,600,000	+6,300,000	50%	45%
Wage, interest, and/or pension	71,000,000	+5,300,000	54%	48%
Wage, interest, pension, and/or dividends	73,400,000	+2,500,000	56%	50%
Wage, interest, pension, dividends, and/or capital gains	78,900,000	+5,500,000	60%	54%
Wage, interest, pension, dividends, capital gains, and/or IRA	87,100,000	+8,200,000	66%	59%
Wage, interest, pension, dividends, capital gains, IRA, and/or unemployment	90,700,000	+3,600,000	69%	62%

As the IRS already imposes reporting obligations on payors in each one of these seven income categories, implementing a parallel withholding regime would be straightforward, albeit not simple. Likewise, if various adjustments were made to the tax system such that certain frequently claimed deductions and credits could be included in PAYE, the system could accurately collect tax liabilities during the year for over half of all U.S. taxpayers.[48] Even more coverage could be obtained by devising a mechanism for voluntary withholding by certain independent contractors, such as those participating in the sharing economy.[49] This withholding, however, would only be feasible in the context of payors that exceeded a specified size threshold.

An initial expansion of PAYE should focus on increasing the income sources with respect to which withholding could be applied. Thereafter, if desirable, deductions and credits could be incorporated into the PAYE system, a step that would facilitate the exact withholding of tax liability for substantial numbers of U.S. taxpayers.

Ultimately, an increase in PAYE coverage, be it of modest or more ambitious scope, would yield benefits to both taxpayers and the government. The more income items included in a PAYE regime, the more taxpayers would have their tax liabilities fully collected at source. This circumstance would free

47 IRS, IRTF, CDW, individual returns for TY 2016, data accessed Oct. 1, 2018. The buildup of PAYE income items relies solely on nonitemizing returns, as this the potential PAYE system considered here is designed to cover only those taxpayers claiming the standard deduction. For a more in-depth discussion of the possible limitations on a U.S. PAYE system, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

48 For an in-depth discussion of ways to expand PAYE coverage, see Research Study: *A Conceptual Analysis of Pay-As-You-Earn (PAYE) Withholding Systems as a Mechanism for Simplifying and Improving U.S. Tax Administration*, *infra*.

49 *Improving Tax Administration Today: Hearing Before the S. Subcomm. on Taxation and IRS Oversight of the S. Comm. on Finance*, 115th Cong. (Jul. 26, 2018) (statement of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2017 Annual Report to Congress 329-331; National Taxpayer Advocate Purple Book: *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 81-82 (Dec. 2017"; National Taxpayer Advocate 2017 Annual Report to Congress 165-171.

taxpayers from the potential of paying large year-end tax liabilities and would free the IRS from having to seek payment of those liabilities from taxpayers, some of whom may have already spent the money on living and other expenses. Moreover, an expanded PAYE system would substantially minimize the number and impact of reporting errors made by good-faith taxpayers, as many of the calculation and remittance duties would be undertaken by employers or other third parties.

Requisite Year-End Tax Reconciliations Could Be Simplified and Streamlined by Robust Fillable Forms

FFI has created a range of electronic tax returns, schedules, and forms, which comprises its Fillable Forms product. According to the IRS, "Taxpayers can download, save and print their tax return/tax return information as .PDF document(s) using their own computer."[50] Nevertheless, TAS has received complaints that taxpayers are unable to print the Form 1040 from Fillable Forms, and that taxpayers cannot save the Form 1040 and attachments to their own computers upon completion.

Additionally, many of these Fillable Forms have limitations that restrict their usefulness to taxpayers. For example, line 11 of Schedule A will only allow one individual's personal information to be entered.[51] Similarly, taxpayers are unable to add explanatory statements and still retain eligibility for e-filing.[52] While such caveats will only affect relatively few taxpayers, most Fillable Forms have similarly small limitations, which, taken together, stand as a substantial deterrent to broad use of the program.

Further, the IRS currently does not make available online accounts that would allow taxpayers to access their individual documents and import the data directly into a return. Even if that ability existed, Fillable Forms lack the capacity to perform the required mathematical steps involved in completing the tax return. Although Fillable Forms do exist, taxpayers must populate those forms themselves, perform the needed mathematical operations, and accurately transcribe the results of their computations. Given the multiple steps to be undertaken and the relatively minimal value derived by taxpayers from use of Fillable Forms, it is not surprising that only 0.2 percent of U.S. taxpayers used Fillable Forms in 2017.[53]

As a potential means of increasing this level of usage and enhancing the accuracy of filed returns, the IRS itself should be charged with analyzing and reporting on the feasibility of developing a robust and effective suite of interactive tax returns, schedules, and forms. The starting point of this initiative would be the establishment of individual accounts that taxpayers could access to obtain their real-time tax information and related forms, such as Forms W-2 and 1099. Thereafter, taxpayers should be able to import the data on these forms into their tax returns, which then would automatically perform the necessary calculations to determine tax refunds or liabilities. Further, all of this tax return information should be downloadable, such that it can be used by taxpayers themselves, forwarded to authorized tax return preparers, or imported into tax return preparation software. Such upgraded functionality would significantly expand the use of Fillable Forms and substantially increase the ease and accuracy of tax return preparation.

---

50 IRS response to TAS information request (Sept. 7, 2018).

51 IRS, *Available Forms and Limitations* (Nov. 21, 2018) https://www.irs.gov/e-file-providers/list-of-available-free-file-fillable-forms.

52 *Id*.

53 IRS response to TAS information request (Sept. 7, 2018).

EXPLANATION OF RECOMMENDATION

The National Taxpayer Advocate recommends that Congress enact legislation directing the Treasury Department, in consultation with the IRS and the National Taxpayer Advocate, to analyze and report on the feasibility of and steps necessary for: adopting an IRS-determined withholding code as an alternative to the Form W-4 approach currently utilized in U.S. tax administration; expanding withholding at source to encompass not only wages, but taxable interest, pensions, dividends, capital gains, IRA income, unemployment, and eventually certain earnings as an independent contractor; and furnishing information return data to taxpayers electronically for direct importation into tax return preparation software or to authorized tax return preparers.[54]

By doing so, Congress would facilitate important research and thought regarding specific changes that could bring the U.S. tax system into the 21st century and meaningfully enhance the ease with which taxpayers can comply with their tax obligations. Among other things, taxpayers' privacy could be increased through the use of a withholding code issued to employers. Further, by expanding the scope of the U.S. PAYE system, additional withholding at source could be undertaken such that taxpayers would have their tax liabilities collected more accurately throughout the year, and fewer adjustments would be needed during the year-end tax reconciliation process. Finally, the implementation of a truly robust Fillable Forms regime would allow taxpayers to more easily and precisely undertake preparation and filing of their income tax returns.

54 If the study indicates that progress toward PAYE is feasible, Congress should consider specifying a target date by which implementation should be completed. Such a deadline had a salutary impact in the case of e-filing goals and likely would have similar benefits in the instant case. *See* Pub. L. No. 105-206, § 2001(a)(2), 112 Stat. 685, 723 (1998).

LR #9 INDIAN EMPLOYMENT CREDIT: Amend IRC § 45A to Make the Indian Employment Credit an Elective Credit for Employers Who Hire Native Americans

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to a Fair and Just Tax System*

PROBLEM

Occasionally, the original intent of Congress in enacting legislation may be frustrated when the law interacts with other, existing provisions. Such is the case for the Indian Employment Credit (IEC), codified in Internal Revenue Code (IRC) § 45A. In 1993, Congress introduced IRC § 45A,[2] a provision that provides a monetary incentive in the form of a tax credit to employers who hire Native Americans who meet all the requirements of the provision.[3] IRC § 45A works by providing a *mandatory* tax credit based on the wages and employee health insurance costs paid by the employer to qualified employees in the taxable year.[4]

The Indian Employment Credit was created to encourage employers to hire more Native American workers in economically distressed communities, since many Native American reservations throughout the United States suffered "from staggering unemployment, nagging poverty, and huge infrastructure deficiencies."[5] The credit is available only if the Native American employee of the employer claiming the credit lives and works on or near a recognized Indian reservation.[6] Furthermore, only the first $20,000 of wages of the employee are eligible for this credit and wages paid by the employer to any employee who makes more than $30,000 per year (adjusted for inflation) are not eligible for this credit.[7]

IRC § 45A is affected by two other provisions within the IRC. First, § 280C prohibits a deduction for the portion of wages and salaries paid in the taxable year which is equal to the sum of credits *determined* under § 45A.[8] This provision effectively prevents a taxpayer from benefitting both from the Indian

1 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

2 IRC § 45A, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) (as amended by the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 40301(a), 132 Stat. 64, 145) (2018)). IRC § 45A does not apply to taxable years beginning after December 31, 2017. *See* IRC § 45A(f). We are making this recommendation because it is likely that the Indian Employment Credit (IEC) may be extended again by Congress. The Indian Employment Credit has been repeatedly extended by Congress continuously since it was introduced in 1993. The Indian Employment Credit is claimed on IRS Form 8445, *Indian Employment Credit* (2017), https://www.irs.gov/pub/irs-pdf/f8845.pdf.

3 *See* IRC § 45A. This credit is often referred to as the "Indian Employment Credit."

4 *See* IRC § 45A. This provision covers *any* employer, engaged in a trade or business, who pays wages to or health insurance costs for qualified Native American employees. The plain language of the statute indicates that the credit is not elective but rather mandatory. As discussed below, the Tax Court has interpreted the statute in the same way. *See Uniband, Inc. v. Comm'r*, 140 T.C. 230 (2013).

5 139 Cong. Rec. S7815, 199-200 (daily ed. June 24, 1993) (statement of Senator John McCain) (during floor debate on H.R. 2264, the Senate adopted the provision with the Amendment 537).

6 IRC § 45A(c)(1)(C).

7 IRC § 45A(c)(2)–(3).

8 IRC § 280C.

Employment Credit and another deduction on the same costs. Second, IRC § 38(c) sets a cap on business credits generally, which includes IRC § 45A.[9]

The mandatory nature of IRC § 280C can sometimes result in an employer's tax liability *increasing* because it could result in a *mandatory* reduction of the employer's IRC § 162 deduction by the amount allowed under IRC § 45A while the allowable amount of credit is limited under the IRC § 38(c) general business credit limitation.[10] As mentioned earlier, the mandatory nature of IRC § 45A also contributes to this problem. This outcome, resulting in a disadvantage for the employer that would have been better off not having hired Native American employees, frustrates the original purpose of the credit.

EXAMPLE

Company X is a small sand, gravel, and stone company which produces materials to be used for construction. Company X has been located on an Indian reservation in Pierre, South Dakota since 1990. It hires Native American members of the Sioux Nation reservation, located near the Cheyenne River, to work as construction equipment operators and warehouse technicians.

In Tax Year (TY) 1993 (*i.e.*, the base year for the credit), Company X's qualified wages paid for its qualified Native American employees were $10,000 per year for each employee. Company X had two qualified Native American employees in TY 1993 with qualified wages of $20,000 ($10,000 each). In TY 2016, Company X had qualified wages of $60,000 and two qualified employees ($30,000 each).[11] Company X had no qualified employee health insurance costs in either tax year. The IRC § 280C limitation is applied separately to the TY 2016 for which the credit is being computed and to the base year—TY 1993. Thus, Company X's wages of $60,000 for TY 2016 is limited to $40,000 (*i.e.*, due to the $20,000 cap for each employee). The $20,000 for TY 1993 is then subtracted from the TY 2016 amount ($40,000), leaving $20,000, and the correct credit is 20 percent of that, or $4,000. However, Company X has reached the cap of all allowable IRC § 38(c) business credits, and the Indian Employment Credit cannot reduce Company X's tax liability any further.

As a result, the company has a low Indian Employment Credit which cannot be claimed; however, to Company X's disadvantage, the IRS reduced Company X's total deductible wages that it could have claimed under the IRC § 162 business expenses by the Indian Employment credit amount of $4,000 determined under IRC § 45A. The net result of the IRS's adjustments (*i.e.*, the disallowance of the Indian employment credit and the reduction of total wage deductions) resulted in a greater amount of tax for Company X.

Upon finding out about this disadvantage in the reduction of its total deductible wages, Company X tried to file an amended tax return arguing that IRC § 45A is elective, so that it can elect not to take the credit and not allow the IRS determination to stand. The IRS rejected the correction, however, arguing that the credit is mandatory, citing to the Tax Court's plain language interpretation of IRC § 45A in *Uniband*.[12]

---

9 IRC § 38(c)(1).

10 IRC § 38(c)(1); IRC § 280C(a). IRC § 280C(a) disallows a deduction for an amount of the wages equal to the credit for employment credits, including for IRC § 45A. The Indian Employment Credit is also subject to the limitations and carryover rules in IRC §§ 38 and 39. *See* IRC §§ 38 and 39.

11 These figures are adjusted for inflation under IRC § 415(d). Beginning in 2009, the original § 45A(c)(2) limit of $30,000 to be considered a qualified employee was adjusted for inflation to be $45,000. *See* IRS Notice 2008-102, 2008-2 C.B. 1106.

12 *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 271 (2013) (internal citations omitted).

RECOMMENDATION

In the event that Congress extends IRC § 45A, as it has in the past, and to promote the taxpayers' *rights to pay no more than the correct amount of tax* and *to a fair and just tax system*, the National Taxpayer Advocate recommends Congress amend the statute to make the Indian Employment Credit elective instead of a mandatory credit for employers who hire eligible Native American employees.[13]

PRESENT LAW

In 1993, Congress created the Indian Employment Credit, to provide an incentive in the form of a tax credit to employers who hire eligible Native Americans who meet all the requirements of the provision.[14] For tax years beginning before 2018,[15] an employer may claim the Indian Employment Credit equal to 20 percent of the excess of the sum of qualified wages and the qualified employee health insurance costs paid or incurred during a tax year, over the amount paid or incurred by the employer during TY 1993 (the base year).[16] This credit must be claimed on the IRS Form 8445, *Indian Employment Credit*.[17] For the purposes of the Indian Employment Credit, the aggregate amount of the qualified wages and employee health insurance costs for any employee allowed for any given year is $20,000 per tax year.[18] Furthermore, employees of the employer receiving wages or health insurance benefits above $30,000 are not eligible to be included by the employer for this credit.[19] To qualify for this credit:

1) The employee or his or her spouse must be an enrolled member of an Indian tribe;[20]
2) The services performed by the employee for the employer must be performed within an Indian reservation;[21]
3) The employee's principal place of abode while performing the services must be on or near the Indian reservation where the services are performed;[22]
4) Over 50 percent of the wages paid or incurred by the employer to the employee during the tax year must be for services performed in the employer's trade or business,[23] and

---

13 On January 16, 2019, Senate Committee on Finance Chairman Charles Grassley stated that it is "too late" to renew extenders (such as IRC § 45A) for the 2018 filing season but that the Committee aims to renew extenders later in the year. *See Grassley: Time Up for Tax Extenders*, Congressional Quarterly News (Jan. 16, 2019) (statement of Senate Committee on Finance Chairman Charles Grassley).

14 IRC § 45A, Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 (1993) (as amended by the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 40301(a), 132 Stat. 64, 145) (2018)). IRC § 45A does not apply to taxable years beginning after December 31, 2017. *See* IRC § 45A(f). We are making this recommendation because it is likely that the Indian Employment Credit may be extended again by Congress. The Indian Employment Credit has been repeatedly extended by Congress continuously since it was introduced in 1993. Most recently, in February 9, 2018, it was extended to apply to all tax years before December 31, 2017. *See* Pub. L. No. 115-123, § 40301(a), 132 Stat. 64, 145 (2018).

15 *See* IRC § 45A(f).

16 IRC § 45A(a)–(c).

17 IRS Form 8445, *Indian Employment Credit* (2017), https://www.irs.gov/pub/irs-pdf/f8845.pdf.

18 IRC § 45A(b)(3).

19 IRC § 45A(c)(2).

20 IRC § 45A(c)(1)(A).

21 IRC § 45A(c)(1)(B). For the purposes of this credit, an Indian reservation means a reservation as defined in § 3(d) of the Indian Financing Act of 1974 or § 4(10) of the Indian Child Welfare Act of 1978. *See also Instructions for Form 8845, Indian Employment Credit* (Feb. 27, 2018), https://www.irs.gov/pub/irs-pdf/i8845.pdf.

22 IRC § 45A(c)(1)(C). The statute restricts the employee's place of employment to on or near an Indian reservation in which the employment services are performed. The term "Indian reservation" is defined by IRC § 168(j)(6).

23 IRC § 45A(c)(4).

5) the employees cannot be a five percent or more owner of the company,[24] or a person employed in the gambling and gaming industry.[25]

Furthermore, under IRC § 38(c)(1), business credits, such as the Indian Employment Credit, may not exceed the excess (if any) of the taxpayer's net income tax over the greater of either the tentative minimum tax for the taxable year or 25 percent of so much of the taxpayer's net regular tax liability that exceeds $25,000.[26] This further places a limitation in the form of a cap on the Indian Employment Credit and was aimed at preventing business taxpayers from using credits to reduce their tentative minimum tax.[27]

REASONS FOR CHANGE

This potential disincentive that exists with using the Indian Employment Credit in certain situations can be avoided by making the credit an *elective* credit instead of a *mandatory* credit.[28] As explained above, the Indian Employment Credit was introduced to create an incentive to hire Native Americans on Indian reservations.[29] The credit was intended to "in some way attempt to address endemic and severe problems that exist on Indian country," which exist because of "the failure of [the United States] to live up to treaty obligations."[30]

A 2013 United States Tax Court case, *Uniband, Inc. v. Commissioner*, provides useful insight into how the credit is calculated and whether it is mandatory.[31] In *Uniband*, the taxpayer took its entire IRC §162 business deduction[32] instead of reducing the deduction and claiming the Indian Employment Credit, which the taxpayer was entitled to take.[33] The taxpayer in *Uniband* did this because the amount of the credit the company was eligible for was limited under the general business credit in IRC §38(c)(1).[34] IRC § 45A only provides an amount *determined* that becomes a component of what is *allowed* as a credit by IRC § 38(a).[35] The IRS adjusted the taxpayer's return by applying the limited credit and reducing

24 IRC § 45A(c)(5)(B).

25 IRC § 45A(c)(5)(C).

26 IRC § 38(c)(1). The statute defines "net income tax" as the sum of the regular tax liability and the tax imposed by IRC § 55 reduced by the credits allowable under subparts A and B of this part (*i.e.*, §§ 21 - 30D). IRC § 38(c)(1). The statute defines "net regular tax liability" as the regular tax liability reduced by the sum of the credits allowable under subparts A and B of this part (*i.e.*, §§ 21 - 30D). IRC § 38(c)(1). The term "tentative minimum tax" means the amount determined under IRC § 55(b)(1) (defining the term "qualified wages").

27 *See* H.R. Rep. No. 103-213, at 720-723 (1993) (Conf. Rep.). *See also Uniband, Inc. v. Comm'r*, 140 T.C. 230, 271 (2013) (internal citations omitted). The Tax Cuts and Jobs Act of 2017 repealed the corporate alternative minimum tax. *See* Pub. L. No. 115-97, § 12001, 131 Stat. 2054, 2092 (2017).

28 The Indian Employment Credit has been repeatedly extended by Congress since it was introduced in 1993. Most recently, in February 9, 2018, it was extended to apply to all tax years before December 31, 2017. *See* Pub. L. No. 115-123, § 40301(a), 132 Stat. 64, 145 (2018) (amending the provision to make it applicable to taxable years beginning after Dec. 31, 2016, as provided by § 40301(b) of Pub. Law. No. 115-123, which appears as a note to this section) amended subsection (f) by substituting "December 31, 2017" for "December 31, 2016").

29 139 Cong. Rec. S7815, 199-200 (daily ed. June 24, 1993).

30 *Id*. (statement of Senator John McCain) (during floor debate on H.R. 2264, the Senate adopted the provision with the Amendment 537).

31 *Uniband, Inc. v. Comm'r*, 140 T.C. 230 (2013).

32 IRC § 162(a) allows a deduction for all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. IRC § 262, however, provides that no deduction is allowed for personal, living, or family expenses. IRC § 162(a); IRC § 262.

33 *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 241 (2013).

34 *Id.* at 270.

35 *Id.* at 271.

the taxpayer's IRC §162 deduction by the full amount determined (but not allowed) under IRC § 45A.[36] This resulted in a net disadvantage to the taxpayer.[37]

The taxpayer in *Uniband* presented two arguments against the IRS's interpretation.[38] First, the taxpayer argued that the Indian Employment Credit is not mandatory, and therefore if a taxpayer chooses not to claim it then the taxpayer's IRC §162 deduction should similarly not be reduced.[39] Second, the taxpayer argued that IRC § 280C should be read as only limiting the deduction to the extent that the Indian Employment Credit is limited under IRC § 38(c)(1) to avoid frustrating the purpose of the Indian Employment Credit, which is to encourage businesses to hire more Native Americans.[40]

The Tax Court disagreed with both of the taxpayer's assertions in *Uniband*.[41] The court interpreted IRC § 280C as not contemplating the amount of credit that is "allowed," but rather requiring a deduction of the amount of credit that is "determined."[42] Therefore, the Tax Court reasoned that IRC § 280C is independent of whether the general business credit, and by extension the Indian Employment Credit, is fully allowed under IRC § 38(a) or limited by IRC § 38(c)(1).[43] The Tax Court declined to accept the taxpayer's policy argument, which it determined departed from the "plain language" reading of the statute as currently written.[44] Additionally, the Court pointed out that Congress can fix this issue by making it an elective credit.[45] The Tax Court's plain meaning interpretation of IRC § 45A and its reference to the legislative history of the research credit provision in IRC § 51(g), a different tax credit, with the same drawbacks as IRC § 45A, indicates that the Tax Court believes that the sole remedy is legislative, not judicial.[46]

Figure 2.9.1 is a table that shows the total number of taxpayers who have claimed the Indian Employment Credit for the past three tax years. As shown, the greatest amount of Indian Employment Credit claimed in the past three tax years was through IRS Form 1040, by individual taxpayers. In TY 2017, a total of 6,544 individual taxpayers claimed it on Form 1040, compared to 170 estates and trusts, and 455 corporations. As shown, in TY 2016, a total of 8,399 individual taxpayers claimed it on Form 1040, compared to 225 estates and trusts, and 948 corporations. Furthermore, in TY 2015, a total of 8,269 individual taxpayers claimed it on Form 1040, compared to 264 estates and trusts, and 978 corporations.

---

36 *Uniband, Inc. v. Comm'r*, 140 T.C. 230, 241 (2013).
37 *Id.*
38 *Id.* at 270.
39 *Id.*
40 *Id.* at 270-72.
41 *Id.*
42 *Id.*
43 *Id.* at 271.
44 *Id.* at 272.
45 *Id.*
46 *Id.*

FIGURE 2.9.1, Indian Employment Credit Statistics for TY 2015–2017[47]

Type of IRS Form Used by Taxpayers	Form 1040 (Individual Taxpayers)			Form 1041 (Estates and Trusts)			Corporations		
	TY2015	TY2016	TY2017	TY2015	TY2016	TY2017	TY2015	TY2016	TY2017
Total No. of Taxpayers Claiming I.E.C.	8,269	8,399	6,544	264	225	170	978	948	455
Total I.E.C. Claimed in U.S. Dollars	$657,714,356	$1,952,242,529	$765,705,903	$1,013,260	$819,882	$351,413	$73,281,571	$65,757,183	$14,614,049

EXPLANATION OF RECOMMENDATION

Congress can model IRC § 45A after the language in the work opportunity credit in IRC § 51(j), which states that "[a] taxpayer may elect to have this section not apply for any taxable year."[48] The Tax Court in *Uniband* also pointed to other examples in the IRC where similar credits were elective.[49]

Considering the legislative purpose of IRC § 45A, described above, it would make sense to prevent a disincentive for employers by making the credit elective rather than mandatory. As the Tax Court observed, "Congress has shown that it is aware of the conundrum of the sort" and "it knows how to fix it when it wants to—*i.e.*, by allowing a credit determination to be optional in certain cases."[50]

The Indian Employment Credit can be made elective or optional for employers by adding language such as in IRC § 51(j)(1) to the section 45A that would allow taxpayers to opt out in any taxable year.[51] That way, in situations in which employers are disadvantaged by taking the credit, they may avoid the disadvantage by electing not to claim the credit. Otherwise, the legislative intent to create an economic incentive to benefit Native American communities is frustrated because businesses would think twice about hiring Native American employees.

47 This data was obtained on Jan. 31, 2019, from the Business Returns Transaction File on the IRS Compliance Data Warehouse (CDW) (returns processed as of cycle 43) (data through Oct. 2018) and from the Individual Returns Transaction File on the IRS CDW (returns processed as of cycle 43) (data through Oct. 2018). The calculations for corporations in the figure combined data from IRS Forms 1120F, 1120L, 1120, 1120C, 1120PC, and 1120REIT for each tax year (TY) (TY 2015, TY 2016, and TY 2017).

48 IRC § 51(j)(1).

49 *See Uniband, Inc. v. Comm'r*, 140 T.C. 230, 271 n.33 (2013) (citing to elective language in IRC § 51(j)(1) ("A taxpayer may elect to have this section [work opportunity credit] not apply for any taxable year"); IRC § 40(f)(1) ("A taxpayer may elect to have this section [alcohol fuel credit] not apply for any taxable year"); IRC § 43(e)(1) ("A taxpayer may elect to have this section [enhanced oil recovery credit] not apply for any taxable year"); IRC § 45B(d)(1) ("This section [credit for portion of employer Social Security taxes paid with respect to employee cash tips] shall not apply to a taxpayer for any taxable year if such taxpayer elects to have this section not apply for such taxable year"); IRC § 45E(e)(3) ("This section [small employer pension plan startup cost credit] shall not apply to a taxpayer for any taxable year if such taxpayer elects to have this section not apply for such taxable year"); IRC §45H(g) ("No credit [for production of low sulfur diesel fuel] shall be determined under subsection (a) for the taxable year if the taxpayer elects not to have subsection (a) apply to such taxable year").

50 *See Uniband, Inc. v. Comm'r*, 140 T.C. 230, 270 (2013).

51 *See* IRC § 51(j)(1).

LR #10 CHILD TAX CREDIT: Amend Internal Revenue Code § 24(c)(1) to Conform With § 152(c)(3)(B) for Permanently and Totally Disabled Individuals Age 17 and Older

PROBLEM

In general, Internal Revenue Code (IRC) § 24 entitles a taxpayer to claim a Child Tax Credit (CTC) of up to $2,000 (for tax years (TYs) 2018-2025) for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the TY (with an exception for certain noncitizens).[1] The amount of the credit is applied to any taxes due and, in some instances, is refundable (the refundable portion is known as the Additional Child Tax Credit, or ACTC).[2]

Under IRC § 24(c)(1), a qualifying child for the child tax credit must generally meet the definition of a qualifying child as defined in IRC § 152(c) with an exception for certain noncitizens and with a different age requirement: the child must not have attained the age of 17. However, IRC §152(c)(3)(B) provides an exception to the general age requirement within the definition of a qualifying child under IRC § 152(c), if the individual is permanently and totally disabled[3] at any time during the calendar year, permitting a guardian to claim as a qualifying child an individual who is totally and permanently disabled, regardless of age.[4]

The result is that a guardian may have a permanently and totally disabled dependent older than the general age limit who meets the definition of a qualifying child for purposes of other sections of the IRC,[5] but not for purposes of the CTC.[6] This difference undermines the *right to a fair and just tax system*.[7]

Changes to the tax law under the Tax Cuts and Jobs Act (TCJA) render this issue more pressing.[8] While the TCJA added a new credit of $500 for other dependents under IRC § 24 and expanded the CTC, it also suspended dependency exemptions, leaving taxpayers with a permanently and totally disabled child who has attained the age of 17 potentially worse off than under the previous tax law.[9]

---

1 Internal Revenue Code (IRC) § 24(a) and (c), as modified by the Tax Cuts and Jobs Act (TCJA), P.L. No. 115-97, § 11022. The amendment to section 24 by the TCJA is in effect for tax years 2018 through 2025. The amount of the Child Tax Credit (CTC) is reduced (but not below zero) by $50 for each $1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount ($400,000 in the case of a joint return, $200,000 for any other filing status). IRC § 24(b)(1) and (2) as modified by the TCJA, P.L. No. 115-97, §11022.

2 IRC § 24(d). For a further discussion of the National Taxpayer Advocate's concerns about various family status provisions of the IRC, see National Taxpayer Advocate 2017 Annual Report to Congress 453-461; National Taxpayer Advocate 2016 Annual Report to Congress 325-357.

3 The definition of permanently and totally disabled for this purpose is contained in IRC § 22(e)(3).

4 IRC § 152(c)(3).

5 *See*, *e.g.*, IRC § 32.

6 IRC § 24(c)(1).

7 *See* Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). *See* IRC § 7803(a)(3).

8 Pub. L. No. 115-97 (2017).

9 TCJA, Pub. L. No. 115-97, §§ 11022 and 11041 (2017). These provisions are effective for tax years 2018 through 2025.

EXAMPLE

Taxpayers Jane and John Doe are parents of a permanently and totally disabled 27-year-old son, Will. On their 2017 tax return, the taxpayers claimed a dependency exemption of $4,050 and a CTC of $1,000 for their son. The IRS allowed the dependency exemption but disallowed the CTC, because their son was over age 17.

Congress passed tax reform legislation at the end of 2017 that effective for TYs 2018-2025, suspended dependency exemptions, but added a $500 credit for a dependent who is not a qualifying child for the CTC. As a result, Jane and John Doe may not now claim a dependency exemption or a CTC for Will, and are only eligible for a $500 credit.

RECOMMENDATION

To assist taxpayers with a permanently and totally disabled child age 17 or older, the National Taxpayer Advocate recommends that Congress amend IRC § 24(c)(1) to provide that, in general, the term "qualifying child" means a qualifying child (as defined in section 152(c)) of the taxpayer who has not attained age 17 or who meets the exception under IRC § 152(c)(3)(B), which provides a special rule for an individual who is permanently and totally disabled.

PRESENT LAW

For TYs 2018 through 2025, IRC § 24 entitles a taxpayer to claim a CTC of up to $2,000 for each qualifying child, as defined in IRC § 152(c), who is under age 17 at the end of the tax year (with an exception for certain noncitizens).[10] The amount of the credit is applied to any taxes due and, in some instances, is refundable (the refundable portion is known as the ACTC).[11]

IRC § 24(c)(1) provides that, a qualifying child for the CTC must meet the definition of a qualifying child as defined in IRC § 152(c) with an exception for certain noncitizens and with a different age requirement: the child must not have attained the age of 17. IRC §152(c)(3)(B) provides an exception to the general age requirement for a qualifying child in IRC § 152(c), if the individual is permanently and totally disabled[12] at any time during the calendar year, permitting a guardian to claim as a qualifying child an individual who is totally and permanently disabled, regardless of age.[13] A similar exception does not apply for purposes of the age requirement under IRC § 24(c).

The TCJA added a new credit for other dependents under IRC § 24 for a dependent who is not a qualifying child for purposes of the CTC, it significantly increased the CTC, and it suspended dependency exemptions.[14]

---

10 IRC § 24(a) and (c), as modified by the TCJA, P.L. No. 115-97, § 11022. See § 24(h). The amount of the CTC is reduced (but not below zero) by $50 for each $1,000 (or fraction thereof) by which the taxpayer's modified adjusted gross income exceeds the threshold amount ($400,000 in the case of a joint return, $200,000 for any other filing status). IRC § 24(b)(1) and (2) as modified by the TCJA, P.L. No. 115-97, § 11022.

11 IRC § 24(d). For a further discussion of the National Taxpayer Advocate's concerns about various family status provisions in the IRC, see National Taxpayer Advocate 2017 Annual Report to Congress 453-461; National Taxpayer Advocate 2016 Annual Report to Congress 325-357.

12 The definition of permanently and totally disabled for this purpose is contained in IRC § 22(e)(3).

13 IRC § 152(c)(3).

14 TCJA, Pub. L. No. 115-97, §§ 11022 and 11041 (2017). These changes to the tax law are effective for tax years 2018-2025.

REASONS FOR CHANGE

A recent court case illustrates the impact this disparity has on families with permanently and totally disabled adult children, particularly under the current law due to the suspension of dependency exemptions. In *Polsky v. United States*, the court found that the taxpayers were not entitled to the CTC for their daughter.[15] The Polskys are parents of a permanently and totally disabled adult. On their 2010 and 2011 tax returns, the taxpayers claimed their daughter as a qualifying child for the CTC, and the IRS disallowed the credit as the child was over age 17 and did not meet the age requirement to be a qualifying child for the CTC. On appeal, the taxpayers argued that IRC § 152(c)(3)(B) controls, not the general age requirement in IRC § 24. IRC § 24(c)(1) states generally that a qualifying child must meet the requirements of IRC § 152(c) and be under the age of 17. IRC § 152(c)(3)(B) provides that an individual meets the age requirements for purposes of IRC § 152(c)(3)(A) if at any time during the year the individual was permanently and totally disabled. The Polskys argued that as their daughter was permanently and totally disabled in the years at issue and, therefore, was a qualifying child under IRC § 152(c), she was also a qualifying child for purposes of IRC § 24. The court agreed with the rationale of the lower court's decision that IRC § 24 incorporates the basic requirements of IRC § 152(c) and adds the additional age limitation of not having attained age 17 for purposes of the CTC. The exception under IRC § 152(c)(3)(B) for permanently and totally disabled individuals is intended to allow taxpayers, such as the Polskys, to continue to claim the individual as a dependent, so long as their daughter remains permanently and totally disabled and meets the other requirements under IRC § 152(c). Thus, the court held that the taxpayers were not entitled to claim the CTC for the years at issue.[16]

As the Court noted in the case of *Polsky v. United States*, while IRC § 24(c)(1) incorporates the basic requirements of IRC § 152(c), it adds the additional requirement that the child must not have attained the age of 17.[17] The Court postulated that § 152(c)(3)(B) was crafted to allow taxpayers to extend the dependency exemption, regardless of the age of the permanently and totally disabled child, and IRC § 24(c)(1) was crafted to end the CTC once a child attains the age of 17. However, under the TCJA, the dependency exemption under IRC § 151 has been suspended through 2025.[18] While taxpayers who have a dependent who does not meet the definition of a qualifying child for purposes of the CTC may now claim a $500 credit for other dependents, the changes to the law by TCJA may leave taxpayers with a permanently and totally disabled child in a worse position than before the enactment of the TCJA and undermine the *right to a fair and just tax system*.[19]

EXPLANATION OF RECOMMENDATION

TAS reviewed tax returns filed for TY 2017 and found that approximately 380,000 returns were filed claiming a dependent who was also receiving Social Security Disability Income and was at least 15 years younger than the primary or secondary taxpayer on the tax return.[20] While this information is not a perfect proxy for the number of taxpayers claiming a permanently and totally disabled child age 17 or older as a dependent (due to the limitations of data the IRS has available), it provides a picture of the number of families who may be impacted by the age limitation of the CTC and the suspension

15 844 F.3d 170 (3d Cir. 2016).
16 *Polsky v. United States*, 844 F.3d 170 (3d Cir. 2016).
17 *Id.*
18 TCJA, Pub. L. No. 115-97, § 11041 (2017).
19 *Id.*
20 IRS, Compliance Data Warehouse (CDW), data retrieved by TAS (Dec. 6, 2018).

of the dependency exemption for TYs 2018-2025. Compared to a family without a permanently and totally disabled child age 17 or older, these families may face higher costs associated with child care, exacerbating the impact of not being able to claim the CTC. In the most recent National Survey of Children with Special Health Care Needs, nearly 22 percent of all respondents indicated that the condition their child has creates financial problems for their family, while nearly 39 percent of families who indicated their children have conditions that usually, always, or a great deal affect the child's abilities report financial problems.[21] Amending IRC § 24(c)(1) to conform with the requirements of IRC § 152(c)(3)(B) will assist these families and support the *right to a fair and just tax system*.

21 Department of Health and Human Services, *The National Survey of Children with Special Health Care Needs* 53 (2010).