LEGISLATIVE RECOMMENDATIONS: Introduction

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 chart immediately following this Introduction summarizes congressional action on recommendations the National Taxpayer Advocate proposed in her 2001 through 2012 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. The following discussion details recent developments relating to the National Taxpayer Advocate's proposals.

REAL TIME TAX SYSTEM

In the 2012 and 2011 Annual Report to Congress, the National Taxpayer Advocate recommended that the IRS provide taxpayers with electronic access to third-party data to assist taxpayers in return preparation and that the IRS develop a pre-populated return option for taxpayers.[2] On April 15, 2013, Senator Shaheen introduced the Simpler Tax Filing Act of 2013, requiring the Secretary of the Treasury to study the feasibility of providing certain taxpayers with an optional, pre-prepared tax return.[3] The bill also requires the Secretary of the Treasury, in consultation with the Taxpayer Advocate Service (TAS), to report to the House Ways and Means Committee and the Senate Finance Committee on actions necessary to achieve the goal of offering pre-prepared tax returns by tax year 2018. The report is to include analysis of the budgetary, administrative, and legislative barriers to achieving that goal, including the funding that it would require.[4]

TAXPAYER RECEIPT ACT OF 2013

To enhance taxpayer awareness of the connection between taxes paid and benefits received, the National Taxpayer Advocate recommended that Congress direct the IRS to provide all taxpayers with a "taxpayer receipt" showing how their tax dollars are being spent.[5] This "taxpayer receipt" could be a more detailed version of the pie chart showing federal income and outlays currently published by the IRS,[6] but would

1 An electronic version of the chart is available on the TAS website at www.TaxpayerAdvocate.irs.gov/2013AnnualReport. The chart describes all the legislative recommendations the National Taxpayer Advocate has made since 2001, and lists each Code section affected by the recommendations.

2 National Taxpayer Advocate 2012 Annual Report to Congress 180-191 (Most Serious Problem: *The Preservation of Fundamental Taxpayer Rights Is Critical as the IRS Develops a Real-Time Tax System*); National Taxpayer Advocate 2011 Annual Report to Congress 284-295 (Most Serious Problem: *Accelerated Third-Party Information Reporting and Pre-Populated Returns Would Reduce Taxpayer Burden and Benefit Tax Administration But Taxpayer Protections Must Be Addressed*).

3 Simpler Tax Filing Act of 2013, S. 722, 113th Cong. (2013).

4 *Id*.

5 National Taxpayer Advocate 2012 Annual Report to Congress 8 (Most Serious Problem: *The Complexity of the Tax Code*).

6 IRC § 7523 requires the IRS to include pie-shaped graphs showing the relative sizes of major outlay categories and major income categories in its instructions for Forms 1040, 1040A, and 1040EZ; *see, e.g.*, IRS Form 1040 Instructions (2012), at 104.

be provided directly to each taxpayer in connection with the filing of a tax return.[7] On August 22, 2013, Representative McDermott proposed legislation that would provide individual taxpayers, via U.S. mail, annual receipts for income taxes reported for the preceding taxable year. The receipt would state the amount paid, the taxpayer's filing status, earned income, and taxable income. Additionally, the receipt would contain tables listing expenditures in various categories of the federal budget, the ten most costly tax expenditures, and related spending information.[8]

TAXPAYER BILL OF RIGHTS

Over the last decade, the National Taxpayer Advocate has recommended many legislative changes that would protect taxpayer rights at a time when the IRS budget is shrinking and resources are shifting to enforcement. The National Taxpayer Advocate urges Congress to enact the legislative recommendations detailed in previous annual reports, beginning with the 2007 recommendation to codify a taxpayer bill of rights (TBOR) that would explicitly detail the rights and responsibilities of taxpayers.[9] On July 22, 2013, Representative Roskam introduced the Taxpayer Bill of Rights Act of 2013,[10] which would amend IRC § 7803 to require the Commissioner of Internal Revenue to ensure that IRS employees are familiar with and act in accordance with taxpayer rights. These rights include the right to be informed, to be assisted, to be heard, to pay no more than the correct amount of tax, to an appeal, to certainty, to privacy, to confidentiality, to representation, and to a fair and just tax system.[11] On July 31, 2013, the bill passed the House of Representatives, and was referred to the Senate Committee on Finance on August 1, 2013.

SMALL BUSINESS TAXPAYER BILL OF RIGHTS ACT OF 2013

Senator Cornyn and Representative Richmond introduced companion bills that would enact a number of the National Taxpayer Advocate's previous recommendations.[12] The proposed legislation would prohibit *ex parte* communications (*i.e.*, those that do not include the taxpayer or the taxpayer's representative)

7 In April 2011, the White House launched a calculator on its website titled "Your Federal Taxpayer Receipt" that allows taxpayers to enter the actual or estimated amounts of their Social Security, Medicare, and income tax payments and to see a breakdown showing how their payments are being applied to major categories of federal spending, including Social Security, Medicare, national defense, health care, job and family security programs, interest on the national debt, Veterans benefits, and education. *See* www.whitehouse.govfiles/taxreceipt/. While we view the availability of this calculator as a positive development, most taxpayers will not take the time to visit this website. We therefore believe a taxpayer receipt should be provided in connection with the filing of a return.

8 Taxpayer Receipt Act of 2013, H.R. 3039 113th Cong. (2013).

9 National Taxpayer Advocate 2011 Annual Report to Congress 493-518 (Legislative Recommendation: *Enact the Recommendations of the National Taxpayer Advocate to Protect Taxpayer Rights*). *See also* National Taxpayer Advocate's Report to Acting Commissioner Daniel Werfel, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration* (Nov. 4, 2013), *available at* www.Taxpayer Advocate.irs.gov/2013AnnualReport; Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration, supra*.

10 Taxpayer Bill of Rights Act of 2013, H.R. 2768, 113th Cong. (2013).

11 *Id*.

12 Small Business Taxpayer Bill of Rights Act of 2013, S. 725, 113th Cong. (2013) and H.R. 3479, 113th Cong. (2013). See also Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration, supra*.

between Appeals officers and other IRS employees.[13] In addition, the proposed legislation would extend the period in which a third party can bring a suit for return of levied funds or proceeds.[14]

The legislation also contains two of the National Taxpayer Advocate's recommendations regarding relief from joint and several liability. The bills would:

- Suspend the running of the period for filing a Tax Court petition seeking review of an innocent spouse claim for the time the taxpayer is prohibited by reason of the automatic stay imposed under section 362 of the Bankruptcy Code from filing such petition, plus 60 additional days;[15] and
- Clarify that the scope and standard of review for taxpayers seeking equitable relief from joint and several liability under IRC § 6015(f) is *de novo*.[16]

THE SMALL BUSINESS PAYROLL PROTECTION ACT OF 2013

In recent years, a number of third party payers have gone out of business or embezzled their customers' funds. Because employers remain liable for payroll taxes, self-employed and small business taxpayers who fall victim to these situations can experience significant burden. This burden includes not only being forced to pay the amount twice — once to the third party payer that absconded with or dissipated the funds, and a second time to the IRS — but also being liable for interest and penalties. Some small businesses may not be able to recover from these setbacks and will be forced to cease operations.

This issue demonstrates the vital need for taxpayer protection in the payroll service industry, particularly for small business taxpayers that hire smaller third party payers. Beginning with the 2004 Annual Report to Congress, the National Taxpayer Advocate has addressed the problem of third party payer failures and recommended several legislative changes to Congress that could prevent or minimize the negative impact of these failures, including amending the Code to:

- Define a third party payer;
- Make a third party payer jointly and severally liable for the amount of tax collected from client employers but not paid over to the Treasury, plus applicable interest and penalties;

13 S. 725, 113th Cong. § 7 (2013) and H.R. 3479, 113th Cong. § 7 (2013). *See* 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*) (noting the IRS Restructuring and Reform Act of 1998 prohibits *ex parte* communication between Appeals employees and other IRS employees, but recent IRS practices allowing Appeals employees to share office space with other IRS employees foster a perception of a lack of independence).

14 Both bills extend the time for third parties to sue from nine months to three years. S. 725, 113th Cong. § 9 (2013); H.R. 3479, 113th Cong. § 9 (2013). *See* National Taxpayer Advocate 2001 Annual Report to Congress 202-209 (Legislative Recommendation: *Return of Levy or Sale Proceeds*).

15 S. 725, 113th Cong. § 11 (2013); H.R. 3479, 113th Cong. § 11 (2013). *See* National Taxpayer Advocate 2004 Annual Report to Congress 490-492 (Legislative Recommendation: *Effect of Automatic Stay Imposed in Bankruptcy Cases upon Innocent Spouse and CDP Petitions in Tax Court*).

16 S. 725, 113th Cong. § 14 (2013); H.R. 3479, 113th Cong. § 14 (2013). *See* National Taxpayer Advocate 2011 Annual Report to Congress 531-536 (Legislative Recommendation: *Clarify that the Scope and Standard of Tax Court Determinations Under Internal Revenue Code Section 6015(f) Is De Novo*). We note that the Court of Appeals for the Ninth Circuit, in *Wilson v. Comm'r*, 705 F.3d 980 (9th Cir. 2013), held that the scope and standard of the Tax Court's review of claims for relief under IRC § 6015(f) is *de novo*. The IRS acquiesced in the *Wilson* decision. *Action on dec.*, 2012-07 (June 17, 2013). However, the National Taxpayer Advocate believes that an amendment to IRC § 6015 (the innocent spouse provision of the Code) is still necessary with respect another issue, the issue of whether a taxpayer can raise innocent spouse relief as a defense in collection actions, and recommended that Congress address this problem in three Annual Reports to Congress. National Taxpayer Advocate 2010 Annual Report to Congress 377; National Taxpayer Advocate 2009 Annual Report to Congress 378; National Taxpayer Advocate 2007 Annual Report to Congress 549. The problem appears to persist as two district courts issued opinions recently holding that they do not have jurisdiction over IRC § 6015 claims raised as a defense in an action to reduce joint federal tax assessments to judgment or in a lien foreclosure suit. *U.S. v. Popowski*, 110 A.F.T.R.2d (RIA) 6997 (D.S.C. 2012); *U.S. v. Elman*, 110 A.F.T.R.2d (RIA) 6993 (N.D. Ill. 2012). For more detailed information, see Most Litigated Issue: *Relief from Joint and Several Liability Under IRC § 6015, infra/supra*.

- Authorize the IRS to require third party payers to register with the IRS and be sufficiently bonded; and
- Clarify that the Trust Fund Recovery Penalty (TFRP) survives bankruptcy when the debtor is not an individual.[17]

On May 8, 2013, Senator Mikulski introduced the Small Business Payroll Protection Act of 2013, to amend the Code to require the Secretary to establish a registration system for payroll tax deposit agents (defined as any person that provides payroll processing or tax filing and deposit service to one or more employers). The proposal requires such agents to: (1) submit a bond or to submit to quarterly third-party certifications, (2) make certain disclosures to their clients concerning liability for payment of employment taxes, and (3) pay penalties for failing to collect or pay over employment taxes or for attempting to evade or defeat payment of such taxes.[18]

RESTRICT ACCESS TO THE DEATH MASTER FILE

As one means to stem the growing number of tax-related identity theft cases, the National Taxpayer Advocate recommended that Congress restrict access to the Social Security Administration's death master file (DMF).[19] The fiscal year 2014 budget bill contains a provision that restricts access to the DMF records of individuals who died during the previous three calendar years.[20]

CONSOLIDATE EDUCATION INCENTIVES

The National Taxpayer Advocate has suggested consolidating and simplifying various Code provisions to make compliance less difficult.[21] Senator Schumer and Representative Doggett introduced companion bills that include the National Taxpayer Advocate's recommendation to consolidate the education tax credits known as the Hope Scholarship and the Lifetime Learning Credits.[22] The proposed legislation would amend the Code to replace the two credits with a new American Opportunity Tax Credit that: (1) allows an income tax credit of up to $3,000 of the qualified tuition and related expenses of a student who is carrying at least one half of a normal course load; (2) increases the income threshold for reductions in the credit amount based upon modified adjusted gross income; (3) allows a lifetime dollar limitation on such credit of $15,000 for all taxable years; and (4) makes 40 percent of the credit refundable. Additionally, the bill allows an exclusion from gross income of any amount received as a federal Pell grant.

17 National Taxpayer Advocate 2004 Annual Report to Congress 394-399 (Legislative Recommendation: *Protection From Payroll Service Provider Misappropriation*). *See also* National Taxpayer Advocate 2012 Annual Report to Congress 553-559 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); 2007 Annual Report to Congress 538-544 (Legislative Recommendation: *Taxpayer Protection From Third Party Payer Failures*).

18 S. 900, 113th Cong. (2013).

19 *See* National Taxpayer Advocate 2011 Annual Report to Congress 519-523 (Legislative Recommendation: *Restrict Access to the Death Master File*). The DMF is a database available to the public that includes decedents' full names, Social Security numbers, dates of birth, dates of death, and the county, state, and Zip code of their last addresses.

20 The Bipartisan Budget Act of 2013, H.J. Res. 59, 113th Cong. § 203 (2013).

21 *See, e.g.*, National Taxpayer Advocate 2008 Annual Report to Congress 370-372 (Legislative Recommendation: *Simplify and Streamline Education Tax Incentives*).

22 S. 835, 113th Cong. (2013); and H.R. 1738, 113th Cong. (2013).

AMEND THE ADOPTION CREDIT TO ACKNOWLEDGE JURISDICTION OF NATIVE AMERICAN TRIBES

In the 2012 Annual Report, the National Taxpayer Advocate recommended that Congress 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."[23] Because a Native American tribe is not considered a state for purposes of the credit and cannot certify a child's special needs, taxpayers who adopt a Native American special needs child cannot claim the special needs adoption credit. On June 12, 2013, Representative Kilmer introduced the Adoption Tax Credit Tribal Parity Act of 2013 that would allow tribal governments to determine a child is a "child with special needs" for purposes of the adoption tax credit.[24]

LEGISLATIVE RECOMMENDATIONS THAT HAVE LED TO ADMINISTRATIVE CHANGES

Sometimes legislative recommendations made by the National Taxpayer Advocate are accomplished through the issuance of regulations or other administrative guidance. Before proposing a legislative recommendation to Congress, the National Taxpayer Advocate attempts to work with the IRS to address her concerns through the issuance of regulations or other administrative guidance, if possible. When the IRS disagrees with a change that could be accomplished administratively or would not move quickly enough, the National Taxpayer Advocate proposes the change to Congress to give IRS direction. In some cases, the IRS has reconsidered its position and addressed issues raised by the National Taxpayer Advocate through the issuance of guidance, as described below.

Authorize Voluntary Withholding Agreements

Even though withholding is not required on payments to independent contractors (payees), some contractors may wish to have customers (payors) withhold taxes for them, just like they do for employees. Such withholding would help contractors avoid the burdens of making timely quarterly estimated tax payments. It is unclear, however, whether statutory authority exists to enter into such agreements.[25] In an effort to ease compliance burdens for independent contractors, the National Taxpayer Advocate recommended that IRC § 3402(p)(3) be amended to specifically authorize voluntary withholding agreements between independent contractors and service-recipients (as defined in IRC § 6041A(a)(1)) in her 2007 Annual Report to Congress.[26]

In November of 2013, the IRS published temporary Treasury Regulations that permit the Secretary to issue guidance describing other payments for which withholding under a voluntary withholding agreement would be appropriate (*e.g.*, payors agree to withhold income tax on such payments if requested by the

23 National Taxpayer Advocate 2012 Annual Report to Congress 521-525 (Legislative Recommendation: *Amend the Adoption Credit to Acknowledge Jurisdiction of Native American Tribes*).

24 The Adoption Tax Credit Tribal Parity Act of 2013, H.R. 2332, 113th Cong. (2013).

25 IRC § 3402(p)(1) provides for voluntary withholding on certain federal payments (such as Social Security benefits). IRC § 3402(p)(2) provides for voluntary withholding on unemployment compensation payments. IRC § 3402(p)(3) provides for "other voluntary withholding" agreements and authorizes the Secretary, by regulation, to provide for withholding from (1) payments from employer to employee that do not constitute wages, and (2) "any other type of payment with respect to which the Secretary finds that withholding would be appropriate under the provisions of [IRC chapter 24, Collection of Income Tax at Source]."

26 National Taxpayer Advocate 2007 Annual Report to Congress 493-492 (Legislative Recommendation: *Measures to Address Noncompliance in the Cash Economy*).

payee).[27] Such guidance was issued shortly thereafter in the form of Notice 2013-77 which expanded the use of voluntary withholding agreements in the context of certain dividends and other distributions.[28]

Provide Relief for Untimely S Corporation Elections

The National Taxpayer Advocate has called attention to the harmful consequences of allowing taxpayers to elect S corporation status only if they do so by the 15th day of the third month of their taxable year.[29] Consequently, many taxpayers overlook the requirement to submit Form 2553, *Election by a Small Business Corporation*, subjecting themselves to serious tax consequences that include taxation at the corporate level and rendering shareholders unable to deduct operating losses on their individual tax returns. The National Taxpayer Advocate recommended that Congress amend IRC § 1362(b)(1) to allow a small business corporation to elect to be treated as an S corporation by checking a box on its first timely filed (including extensions) tax return, but acknowledged that the opportunities for relief through the issuance of administrative guidance exist and urged the IRS to expedite the issuance of a consolidated revenue procedure for late election relief.[30]

On September 3, 2013, the IRS published a revenue procedure that consolidates relief provisions included in prior revenue procedures and, *inter alia*, provides a simplified method for taxpayers to request relief for late S corporation elections within three years and 75 days after the date on which the S corporation election is intended to be effective.[31]

Aggregate Employment Tax Return Filing by a Designated Third Party Agent

For over a decade, the National Taxpayer Advocate addressed the problem of Third Party Payer (TPP) failures and recommended measures that could prevent or minimize the negative impact of these failures on common law employers, including home care service recipients (HCSRs).[32] Because common law employers remain liable for payroll taxes, those victimized in these situations (especially self-employed and small business taxpayers, and HCSRs) can experience significant burden. Among other things, the National Taxpayer Advocate proposed a legislative change to amend IRC § 3504 to require aggregate filers (*i.e.*, 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

27 Treas. Reg. § 31.3402-1T(c), 78 Fed. Reg. 71476 (Nov. 29, 2013).

28 Notice 2013-77, 2013-50 I.R.B. 632. The Notice specifically addresses the Alaska Native Corporation (ANC) and allows an ANC and any shareholder of the ANC to enter into an agreement for voluntary withholding under IRC § 3402(p)(3)(B). Thus, dividends and other distributions paid by an ANC to a shareholder will be subject to voluntary income tax withholding under section 3402(p)(3)(B) if the shareholder requests the withholding and the ANC agrees to withhold.

29 See 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*). Senator Franken introduced legislation to allow corporations to elect S corporation status with their first filed returns. S. 2271, 112th Cong. (2012).

30 See National Taxpayer Advocate 2010 Annual Report to Congress 278-290 (Most Serious Problem: *S Corporation Election Process Unduly Burdens Small Businesses*).

31 Rev. Proc. 2013-30, 2013-36 I.R.B. 173.

32 See, e.g., National Taxpayer Advocate 2012 Annual Report to Congress 553-559 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); National Taxpayer Advocate 2007 Annual Report to Congress 556-557 (Legislative Recommendation: *Home Care Service Workers*). *See also* National Taxpayer Advocate 2007 Annual Report to Congress 538-544; National Taxpayer Advocate 2004 Annual Report to Congress 394-399; National Taxpayer Advocate 2001 Annual Report to Congress 193.

the failure to file absent reasonable cause, and shift the liability for employment taxes from the service recipients, to the administrators of HCSR funding.[33]

The IRS has taken several steps to address the National Taxpayer Advocate's concerns through the issuance of Treasury Regulations and other administrative guidance.[34] The IRS has created Schedules R (*Schedule for Aggregate Form 941, Schedule for Aggregate Form 940*) for Form 941, *Employer's QUARTERLY Federal Tax Return*, and Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, for tracking employer-agent relationships for agents with an approved Form 2678.[35] Effective December 12, 2013, TPPs authorized to file in the aggregate must now allocate reported and paid employment taxes among their clients; in addition, the IRS has published special rules for agents of the home care service recipients, including state agents, who may file an aggregate Form 940.[36]

SUMMARY OF 2013 LEGISLATIVE RECOMMENDATIONS

1. **Permanently repeal the Alternative Minimum Tax (AMT).**

   The AMT does not achieve its original goal — to ensure that wealthy taxpayers pay at least some tax. By one projection, about 1,000 millionaires will pay no federal income tax in 2013. Those with the highest incomes are actually less likely to pay AMT than those just below them. The AMT penalizes middle income taxpayers for having children, getting married, or paying state and local taxes. The AMT is also unnecessarily complicated and burdensome, even for those who are not subject to it. Many taxpayers must fill out a lengthy form only to find they owe little or no AMT after all. Moreover, the complexity of the AMT reduces the transparency of the tax system, making it more difficult for people to know their marginal tax rate and predict what they will owe. When people owe more than anticipated, voluntary compliance suffers.

2. **Amend IRC § 6511(h)(2) to provide that an individual is financially disabled when he or she has a physical or mental impairment, determined by a licensed medical or mental health professional, which materially limits the individual's management of his or her financial affairs.**

   In 1998 Congress amended IRC § 6511 by adding subsection (h), which suspends the running of the period for filing a claim for a refund where a taxpayer can show that he or she was financially disabled. However, the current, narrowly tailored provision fails to protect taxpayers who lack the capacity to file a refund claim. The statute requires a qualifying taxpayer to have a "medically determinable" physical or mental impairment, limiting the

33 National Taxpayer Advocate 2012 Annual Report to Congress 553-559; National Taxpayer Advocate 2007 Annual Report to Congress 556-557. Under IRC § 3504, the Secretary is authorized to issue regulations to "designate [a] fiduciary, agent, or other person" that has the "control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees, employed by one or more employers," to perform acts required of employers. IRC § 3504. Both the designee and the employer remain liable for payroll taxes and all penalties as long as the agent authorization made on the Form 2678 is in effect. IRC § 3504; Treas. Reg. § 31.3504-1.

34 *See* T.D. 9649, 78 Fed. Reg. 75471 (Dec. 12, 2013) (amending Treas. Reg. § 31.3504-1 to provide that the IRS may authorize an agent to undertake the employment tax obligations of an employer with respect to Federal Unemployment Tax Act (FUTA) tax); Rev. Proc. 2013-39, 2013-52 I.R.B. 830 (updating the procedure for requesting the IRS authorize a person to act as agent under IRC § 3504).

35 The Schedule R includes a list of all employers using the agent with an approved Form 2678 and the payroll liabilities reported by the agent on the Form 941 for each employer. IRM 5.1.24.4.4.1 (Aug. 15, 2012); IRM 21.7.2.4.4.3 (Oct. 1, 2012). *See also* the Schedule R (Form 940), designed for filers of Form 940 having approved Forms 2678. IRM 21.7.3.4.7 (Oct. 1, 2012).

36 Rev. Proc. 2013-39, 2013-52 I.R.B. 830.

evidence the IRS could consider, such as determinations from psychologists or clinical social workers. It also requires that the taxpayer be "unable" to manage his or her financial affairs due to a physical or mental impairment. This forces the individual making the determination to provide a global, "all or nothing," statement about the effect of the impairments. These requirements have led the IRS to dismiss otherwise compelling evidence and deny relief to taxpayers.

3. **Amend IRC § 32(k) to clarify that the IRS has the burden of proof when proposing to impose the two-year ban on claiming EITC.**

   IRC § 32(k) authorizes the IRS to ban taxpayers from claiming the Earned Income Tax Credit (EITC) for two years if the IRS determines they claimed the credit improperly due to reckless or intentional disregard of rules and regulations. The IRS often ignores the statutory requirements for imposing the ban, contravenes its own Chief Counsel guidance, and bypasses its own procedural safeguards to impose the ban. For the vulnerable low income taxpayers who are otherwise eligible for EITC, inappropriately being deprived of the credit for two years is a serious burden. These taxpayers may be intimidated and fearful of protesting the IRS's treatment of them, may not understand they have been wronged when the IRS imposes the ban without following the statutory requirements, and consequently may not seek the assistance they need, such as from Low Income Taxpayer Clinics. A taxpayer may petition the Tax Court for review of the IRS's determination to impose the two-year ban, but the taxpayer may have the burden of proving the IRS acted improperly. The proposed change would require the IRS to produce evidence of the taxpayer's reckless or intentional disregard of rules and regulations and persuade the court that imposition of the ban would be appropriate.

4. **Clarify that the 9.5-percent affordability threshold for the Affordable Care Act's Premium Tax Credit pertains to the applicable type of insurance, whether self-only or family coverage.**

   The recommendation would align the rule with economic affordability. Under a Treasury Regulation implementing the Affordable Care Act, an employee's family may be ineligible for the premium tax credit if the cost of "self-only" insurance would be affordable, even though they pay more for family coverage. This is because a 9.5-percent affordability threshold in the regulation refers to self-only cost — even if the employee needs family coverage. As a logical matter, the affordability threshold creates a disjunct between a stipulated amount and the actual cost of family coverage. Illogical provisions, which run contrary to intuitive behavior, make tax administration difficult. As a practical matter, disqualification from the premium tax credit makes it harder for families to obtain health insurance.

5. **Expand the Taxpayer Identification Number matching statute for purposes of information reports on tuition to allow the IRS to alert colleges of mismatches to resolve with students prior to filing information returns.**

   Although the Internal Revenue Code requires colleges and universities to file information returns with the IRS reflecting tuition payments from students, the law does not permit these eligible educational institutions to verify Taxpayer Identification Numbers (TINs) with

the IRS prior to filing. Unlike other information return filers who can perfect TINs once the IRS advises them of an error, colleges and universities must rely on student input while still facing penalties for errors. Existing law permits TIN matching by payers of income, who would have to do back-up withholding in the case of a payee with an inaccurate TIN. This would be inapplicable to colleges and universities when they are not paying income to students. Nevertheless, colleges and universities have a tuition information reporting requirement for which they need to verify TINs as a practical matter. A TIN may not match a student's name for various reasons, such as transposition errors or name changes.

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 113th Congress	S 1616	Lee	10/30/2013	Referred to the Finance Committee
	HR 243	Ross	1/14/2013	Referred to Ways & Means Committee
Legislative Activity 112th Congress	HR 86	Bachmann	1/5/2011	Referred to Ways & Means Committee
	HR 99	Dreler	1/5/2011	Referred to Ways & Means Committee
	HR 547	Garrett	2/8/2011	Referred to Ways & Means Committee
	HR 3400	Garrett	11/10/2011	Referred to 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 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 1365	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
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 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 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
Tax Preparation and Low Income Taxpayer Clinics (LITC)				
Matching Grants for LITC 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.			
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).**			
	Bill Number	Sponsor	Date	Status
	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
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

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.

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 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

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 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
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
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.			
Legislative Activity 112th Congress	**Pub. L. No. 112-41 § 501, 125 Stat. 428, 459 (2011).**			
	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 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
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 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 Senate 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.			
Legislative Activity 111th Congress	**Pub. L. No. 111-124, § 2041 STAT 2560 (2010).**			
	Bill Number	Sponsor	Date	Status
	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.			
Legislative Activity 110th Congress	**Pub.L. No. 110-28, Title VIII, § 8215, 121 Stat. 193, 194 (2007).**			
	Bill Number	Sponsor	Date	Status
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.			
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 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.	Allow a small business corporation to elect to be treated as an S corporation by checking a box on it's timely filed Form 1120S U.S. Income Tax Return for an S Corporation.			
	Bill Number	Sponsor	Date	Status
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
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 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
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.			
Legislative Activity 110th Congress	**Pub. L. No. 110-343, § 403, 121 Stat. 3854, 3855 (2008).**			
	Bill Number	Sponsor	Date	Status
	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

IRS to Promote Estimated Tax Payments Through the Electronic Federal Tax Payment System (EFTPS) National Taxpayer Advocate 2005 Annual Report to Congress 381–396.	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 fiscal year 2012.			
	Bill Number	Sponsor	Date	Status
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
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.	Amend IRC § 3402(p)(3) to specifically authorize voluntary withholdings agreements between independent contractors and service-recipients as defined in IRC § 6041A(a)(1).			
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
Require Form 1099 Reporting for Incorporated Service Providers National Taxpayer Advocate 2007 Annual Report to Congress 494–496.	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.			
Legislative Activity 111th Congress	**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.			
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.	Eliminate the $10 interest threshold beneath which financial institutions are not required to file Form 1099-INT reports with the IRS.			
	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

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 2007 Annual Report to Congress 486–489.	Enact a Taxpayer Bill of Rights setting forth the fundamental rights and obligations of U.S. taxpayers.			
	Bill Number	Sponsor	Date	Status
Legislative Activity 113th Congress	HR 2768	Roskam	6/22/2013	Passed the House of Representatives, and was referred to the Senate 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
Simplify the Tax Treatment of Cancellation of Debt Income				
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 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.			
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 490–92.	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 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 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 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 2009 National Taxpayer Advocate 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 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 2011 National Taxpayer Advocate 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 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 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.	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 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 H.R. 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
Consolidation of Appeals of Collection Due Process (CDP) Determinations National Taxpayer Advocate 2004 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. 1589-1592 (2004).**			
Waiver of Installment Agreement Fees for Low Income Taxpayers National Taxpayer Advocate 2006 Annual Report to Congress 141–56 (Most Serious Problem: Collection Issues of Low Income Taxpayers).	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.			
Legislative Activity 112th Congress	Bill Number	Sponsor	Date	Status
	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 and Require at Least One Appeals Officer and Settlement Officer in Each State National Taxpayer Advocate 2009 Annual Report to Congress 346-350.	Provide that each Appeals office maintains separate office space, separate phone lines, facsimile, and other electronic communications access, and a separate post office address from any IRS office co-located with the Appeals office.			
Legislative Activity 112th Congress	Bill Number	Sponsor	Date	Status
	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				
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.			
Legislative Activity 108th Congress	Bill Number	Sponsor	Date	Status
	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.			
Legislative Activity 109th Congress	Bill Number	Sponsor	Date	Status
	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.			
Legislative Activity 108th Congress	Bill Number	Sponsor	Date	Status
	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.			
Legislative Activity 109th Congress	Bill Number	Sponsor	Date	Status
	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.			
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.			
Legislative Activity 108th Congress	Bill Number	Sponsor	Date	Status
	HR 22	Houghton	1/3/2003	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				
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 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 2004 Annual Report to Congress 471–477.	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 2861	Schumer	4/15/2008	Referred to the Finance Committee
Office of the Taxpayer Advocate				
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.			
Legislative Activity 112th Congress	Bill Number	Sponsor	Date	Status
	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
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."			
Legislative Activity 111th Congress	**Pub. L. No. 111-124, § 2041 Stat. 2560 (2010).**			
	Bill Number	Sponsor	Date	Status
	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).**			
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.			
Legislative Activity 112th Congress	Bill Number	Sponsor	Date	Status
	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
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. 1546-1548 (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."			

Legislative Activity 108th Congress	Bill Number	Sponsor	Date	Status
	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 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 below several available options.			
Legislative Activity 113th Congress	**H.J. Res. 59, 113th Cong. § 203 (2013).**			
	Bill Number	Sponsor	Date	Status
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

LR #1 Repeal the Alternative Minimum Tax

PROBLEM

The Alternative Minimum Tax (AMT) does not achieve its original goal — to ensure that wealthy taxpayers pay at least some tax.[1] By one projection, about 1,000 millionaires will pay no federal income tax in 2013.[2] Those with the highest incomes are less likely to be affected by the AMT than those just below them.[3]

To help prevent the AMT from hitting the middle class, the American Taxpayer Relief Act of 2012 (ATRA) increased the AMT exemption amount.[4] While this change reduces the number of people subject to the AMT, it does nothing to fix the system's flaws. Today's AMT primarily affects taxpayers for paying state and local taxes and having children.[5] While it is hard to imagine the drafters of the original AMT provision would view the expenses of having children or paying local taxes as tax-avoidance loopholes, that is how those expenses are treated today.

More importantly, the AMT is unnecessarily complex and burdensome for everyone. It requires taxpayers — even if they do not owe AMT — to compute their taxes twice, once under the regular tax rules and again under the AMT rules.

Moreover, the complexity of the AMT reduces the transparency of the tax system, making it more difficult for people to know their marginal tax rate and predict what they will owe. When people owe more than anticipated, voluntary compliance suffers.[6]

Even without any decline in voluntary compliance, the AMT is only projected to bring in $25.6 billion in 2013.[7] Thus, tax simplicity, transparency, voluntary compliance, and taxpayers who live in high-tax states or have children have become collateral damage in the battle to prevent middle- and high-income people from reducing their taxes by applying the regular tax rules enacted by Congress. If Congress does not like those rules, it should change them rather than applying an AMT. After ATRA, repealing the AMT might

1 *The 1969 Economic Report of the President: Hearings before the Joint Economic Comm.*, 91st Cong., pt. 1, p. 46 (1969) (statement of Joseph W. Barr, Secretary of the Treasury).

2 Tax Policy Center (TPC), *Distribution of Tax Units That Pay No Individual Income Tax; by Expanded Cash Income Level, Current Law, 2013*, T13-0230 (Aug. 29, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3989.

3 *See* TPC, *Characteristics of AMT Taxpayers, 2012–2014*, 2023, T13-0210 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3969 (projecting that about 18 percent of millionaires will owe AMT for 2013, as compared to about 64 percent of those earning between $500,000 and $1 million, and 29 percent of those earning between $200,000 and $500,000).

4 ATRA, Pub. L. No. 112-240, 126 Stat. 2317 (Jan. 2, 2013).

5 *See* TPC, *Reconciling AMTI and Taxable Income for AMT Taxpayers in 2008* (Dec. 21, 2010), http://taxpolicycenter.org/taxfacts/displayafact.cfm?DocID=468&Topic2id=30&Topic3id=36.

6 Studies suggest that unexpected tax liabilities reduce filing, payment, and reporting compliance. *See* National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, at 30-35 (summarizing various studies).

7 TPC, *Aggregate AMT Projections and Recent History, 1970-2023*, T13-0208 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid=3967&DocTypeID=7.

cost $384 billion over ten years (down from the pre-ATRA cost of about $1.3 trillion), an amount that could be replaced by changes to the regular tax system.[8]

EXAMPLES

Example 1: Wealthy investor not hit by the AMT. A single childless investor earns $100 million in 2012 from tax-exempt bonds. The investor does not owe any federal income tax and is not subject to the AMT.[9]

Example 2: Single parent living in a high tax state hit by the AMT. A single mother earns $100,000 in wages in 2012, which she uses to support her mother and three children. She deducts $22,000 in state and local property and income taxes and ineligible mortgage interest (*i.e.*, interest subject to AMT), and claims $19,000 in personal exemptions. In the absence of the AMT, she would owe $9,401 under the regular tax system (the tax on $59,000 in taxable income). She owes another $3,443 in AMT because she loses these deductions and exemptions under the AMT, bringing her total federal tax bill to $12,844.[10] Because she did not anticipate owing so much, she did not have enough withheld from her paycheck and cannot timely pay the full amount, triggering penalties and interest.

RECOMMENDATION

Repeal the AMT.[11]

PRESENT LAW

The AMT is a separate system from the regular income tax, with unique rules governing the recognition of income and the timing of deductions and credits. Taxpayers are often required to maintain two sets of records — one for regular income tax purposes and one for AMT purposes.

As discussed in other reports, it is difficult for taxpayers to compute their AMT liability, if any.[12] The IRS has developed an online assistant to help taxpayers determine if they are *potentially* subject to the AMT, and must complete Form 6251, *Alternative Minimum Tax – Individuals*.[13] Some taxpayers complete Form 6251, only to find that they do not owe AMT.

Form 6251 requires the taxpayer to compute alternative minimum taxable income (AMTI) by giving up the benefit of tax preference items to which they are entitled under the regular tax system (*e.g.,* personal

8 TPC, *Aggregate AMT Projections and Recent History, 1970-2023*, T13-0208 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid=3967&DocTypeID=7.

9 Assume the bonds are not private activity bonds, which are subject to the AMT. *See* IRC § 56(b)(1)(C)(iii) and 57(a)(5).

10 After subtracting her $50,600 AMT exemption, her AMT income is $49,400, and it is taxed at a flat 26 percent rate ($49,400 x 26% = $12,844). As noted below, the AMT contains a marriage penalty because the exemption amount for married persons is less than double that for singles. As this example illustrates, however, it may also be said to contain a head of household penalty because a head of household must claim the same exemption amount as a single filer. The computations for this example are before any applicable tax credits (*e.g.*, withholding, estimated tax payments, and potentially, $1,750 in child tax credits).

11 The AMT is codified at IRC § 55 *et. seq*.

12 *See, e.g.*, National Taxpayer Advocate 2003 Annual Report to Congress 5-19.

13 Instructions for Form 1040, *U.S. Individual Income Tax Return* 42 (2012). The assistant is at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Alternative-Minimum-Tax-(AMT)-Assistant-for-Individuals. Alternatively, a taxpayer may follow the instructions to Form 6251 regarding "Who Must File."

and dependency exemptions and itemized deductions for state and local taxes, employee business expenses, and legal fees).[14] On Form 6251, the AMT "exemption amount" replaces the standard deduction and personal exemptions for purposes of the AMT.[15] In addition, one rate applies to income taxed at AMT rates and another (lower) rate to income taxed as long term capital gains or qualified dividends.[16]

After these computations and others, the AMT is equal to the excess, if any, of the taxpayer's "tentative minimum tax" over his or her regular tax liability. For purposes of this comparison, however, the taxpayer must *recompute* his or her regular tax liability if he or she reported any tax from lump sum distributions (from Form 4972, *Tax on Lump Sum Distributions*), claimed a foreign tax credit, or used income averaging (on Form 1040, Schedule J).

A taxpayer who is subject to the AMT may accrue an AMT credit.[17] However, this credit is earned only for AMT liability attributable to timing items — not exclusion items.[18] Timing items are those that are accounted for in different tax years in the regular tax and AMT systems. For example, the AMT may require taxpayers to depreciate property over a longer period than under the regular tax system. Exclusion items are adjustments and tax preference items that result in the permanent disallowance of certain tax benefits, such as the standard deduction, personal exemptions, and certain itemized deductions. In addition, AMT credits can only be used in taxable years in which the taxpayer's regular tax liability, reduced by other nonrefundable credits, exceeds his or her tentative minimum tax.[19] To claim AMT credits, taxpayers must complete Form 8801 *Credit for Prior Year Minimum Tax – Individuals, Estates, and Trusts*, which the IRS estimates will take more than seven hours.[20]

14 Required adjustments include: medical and dental expenses, state and local taxes, certain non-allowable home mortgage interest, miscellaneous itemized deductions, tax refunds, investment interest, depletion, certain net operating losses, interest from specified private activity bonds, qualified small business stock, the exercise of incentive stock options, estates and trusts, electing large partnerships, property dispositions, depreciation on certain assets, passive activities, loss limitations, circulation costs, long-term contracts, mining costs, research and experimental costs, income from pre-1987 installment sales, intangible drilling costs, certain other adjustments and alternative tax net operating loss deductions. *See* IRC § 56 and 57; Form 6251, *Alternative Minimum Tax – Individuals*, Part I (2012).

15 Instructions for Form 6251, *Alternative Minimum Tax – Individuals* 9 (2012); IRC § 55(d) and 56(b)(1)(E). The AMT exemption is phased out for married taxpayers and qualified widowers with AMTI exceeding $150,000, and single head of household taxpayers with AMTI exceeding $112,500. IRC § 55(d)(3); Instructions for Form 6251, *Alternative Minimum Tax – Individuals* 9 (2012). The AMT exemption amount may also be limited for certain people under age 24. *Id.*

16 Form 6251, *Alternative Minimum Tax – Individuals* (2012) (line 31 and part III). In general, the first $175,000 of income subject to AMT is taxed at a 26 percent rate and any excess is taxed at a 28 percent rate. IRC § 55(b)(1)(A). As noted above, capital gains and qualified dividend income are taxed at preferential AMT rates. IRC § 55(b)(3).

17 IRC § 53.

18 IRC § 53(d).

19 IRC § 53(c).

20 Instructions for Form 8801, *Credit for Prior Year Minimum Tax – Individuals, Estates, and Trusts* (2012) (2 hours 4 minutes for recordkeeping, 2 hours 19 minutes to learn about the law, 2 hours 3 minutes to complete the form, and 48 minutes to copy, assemble and send).

REASONS FOR CHANGE

In 1969, Congress enacted a minimum tax (the predecessor of the AMT) after hearing testimony that 155 taxpayers with adjusted gross incomes (AGI) above $200,000 (about $1,438,698 in 2013 dollars)[21] paid no federal income tax for the 1966 tax year, due to tax preferences or loopholes.[22] Today, the AMT fails to ensure that those with the highest incomes pay federal income tax.[23]

The AMT hits the "wrong" taxpayers.

Thousands of U.S. taxpayers with incomes of more than $200,000 paid no income tax anywhere in the world in 2010 (the most recent year for which complete data is available), and by one projection about 1,000 millionaires will pay no federal income tax in 2013.[24] Those with the highest incomes are actually less likely to be hit by the AMT than those just below them.[25] One reason for this is the exclusion of interest on certain tax-exempt bonds (and the allowance of certain deductions) under both regular tax and the AMT.[26] For example, wealthy individuals who invest in certain tax-exempt municipal bonds generally pay no federal income tax on the interest they receive.[27]

Even when high income taxpayers are subject to AMT, they can pay lower rates than moderate income taxpayers because preferential low rates apply to investment income under both the regular tax system and the AMT. In general, the AMT regime taxes upper-income taxpayers at a flat rate of 28 percent.[28] Before 1997, capital gains were considered a preference item and taxed at the same flat rate as other AMT income.[29] Under current law, however, long-term capital gains and qualified dividend income are subject

21 *See* Bureau of Labor Statistics, *CPI Inflation Calculator, available at* http://www.bls.gov/data/inflation_calculator.htm (last visited Dec. 18, 2013).

22 *The 1969 Economic Report of the President: Hearings before the Joint Economic Comm.*, 91st Cong., pt. 1, p. 46 (1969) (statement of Joseph W. Barr, Secretary of the Treasury).

23 Perhaps because the AMT does not fulfill its original purpose, the administration has proposed (1) to cap, at 28 percent, the value of itemized deductions and specified exclusions, and (2) a new minimum tax, called the Fair Share Tax (FST) (a.k.a. the "Buffet rule"), on those making over $1 million ($500,000 in the case of a married individual filing a separate return). Treasury Department, *General Explanations of the Administration's Fiscal Year 2014 Revenue Proposals* 134-137 (Apr. 2013), http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf. In addition, ATRA recently reinstated the Pease limit that phases out itemized deductions for higher income taxpayers. *See* ATRA, Pub. L. No. 112-240, Title I, § 101(b)(2)(A)(ii), 126 Stat. 2317 (Jan. 2, 2013). ATRA also reinstated a personal exemption phase out (PEP). *Id*. The National Taxpayer Advocate has long opposed phase outs as unnecessarily complicated substitutes for increasing tax rates or eliminating tax preferences. *See, e.g.*, National Taxpayer Advocate 2008 Annual Report to Congress 410-413 (Legislative Recommendation: *Eliminate (or Simplify) Phase-outs*).

24 Justin Bryan, *High-Income Tax Returns for 2010*, 32 SOI Bulletin 4, 11 (Spring 2013), http://www.irs.gov/uac/SOI-Tax-Stats-SOI-Bulletin-Spring-2013 (For 2010, "8,046 returns with no worldwide income tax had an AGI of $200,000 or more; 16,082 returns with no worldwide income tax had expanded income of $200,000 or more; and 4,782 returns with no worldwide income tax had both AGI and expanded income of $200,000 or more."); TPC, *Distribution of Tax Units That Pay No Individual Income Tax; by Expanded Cash Income Level, Current Law*, 2013, T13-0230 (Aug. 29, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3989 (number of millionaires).

25 *See* TPC, Characteristics of AMT Taxpayers, 2012-2014, 2023, T13-0210 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3969 (projecting that about 18 percent of millionaires will owe AMT for 2013, as compared to about 64 percent of those earning between $500,000 and $1 million, and 29 percent of those earning between $200,000 and $500,000).

26 Justin Bryan, *High-Income Tax Returns for 2009*, 31 SOI Bulletin 6, 15-17 (Spring 2012), http://www.irs.gov/pub/irs-soi/12soisprbul.pdf ("nontaxable returns under the expanded income concept, were much more likely to have tax-exempt interest than were taxable returns…. Similarly, nontaxable returns were much less likely to have any income from salaries and wages…. Because they do not generate AMT adjustments or preferences, tax-exempt bond interest, itemized deductions for interest expense, miscellaneous itemized deductions not subject to the 2-percent-of-AGI floor, casualty or theft losses, and medical expenses (exceeding 10 percent of AGI) could, by themselves, produce nontaxability.").

27 In theory, they are "taxed" in the sense that they receive a lower rate of interest than they might receive on bonds that produce taxable interest income. However, even if this rate reduction is considered a tax, it is probably not imposed at the investor's marginal income tax rate.

28 The 28 percent rate applies after a phase out of the exemption amount and a 26-percent rate that applies to the first $175,000 of income. *See generally* IRC § 55.

29 Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 311(b), 111 Stat. 788 (1997) (reducing the rate applicable to long-term capital gains under both the regular tax system and the AMT).

to a special low rate, which is generally 15 or 20 percent, under both the regular tax and the AMT.[30] Therefore, taxpayers who have sufficient resources to live off investment income pay tax at 20 percent (or perhaps less if they have tax-exempt bond income), which is less than the 25 percent marginal rate applicable to a single person who earns just $35,351 from wages.[31]

The AMT stealthily increases marginal rates for middle income taxpayers and reduces transparency.

In addition to eliminating tax preferences that taxpayers may expect to claim, the AMT exemption phase out stealthily increases marginal rates for those who are not in the highest tax bracket. Under the regular tax system, the highest marginal rate of 35 percent generally applies to those with taxable income of more than $388,350.[32] As described above, the AMT rules generally impose tax at a rate of 26 percent up to $175,000 and 28 percent on higher amounts. However, the AMT exemptions phase out, costing taxpayers $0.25 for every dollar their AMTI exceeds $150,000 for married filers (or $112,500 for non-married filers).[33] Therefore, the marginal tax rate for those in the AMT exemption phase-out range could exceed 35 percent (the highest regular marginal rate), even if they are subject to lower marginal rates under the regular tax system.[34]

The AMT penalizes families.

The AMT eliminates the tax "benefit" of children (dependency exemptions are lost under the AMT) and marriage (the AMT contains marriage penalties).[35] As a result, having two children is estimated to double a person's likelihood of being hit by AMT in tax year (TY) 2013.[36] Similarly, married taxpayers will be more than five times as likely as single ones to pay AMT in TY 2013.[37] While it is hard to imagine that the drafters of the original AMT provision would view incurring expenses to raise a family as a tax-avoidance loophole, that is essentially the way they are viewed under today's archaic AMT.

30 IRC § 1(h) and 55(b)(3), as amended by ATRA, Pub. L. No. 112-240, § 102(b) (extending preferential rates that were set to expire, but increasing the long term capital gain rate from 15 to 20 percent for taxpayers in the 39.6 tax bracket). Upper middle income taxpayers who benefit from the AMT exemption face a higher marginal tax rate on long-term capital gains and dividend income because it decreases the value of the AMT exemption. *See, e.g.*, Benjamin H. Harris and Christopher Geissler, *Tax Rates on Capital Gains and Dividends Under the AMT*, 118 Tax Notes 1031 (Mar. 3, 2008). An IRS analysis of the 400 taxpayers reporting the highest income found that capital gains constituted between 46 and 72 percent of their total income in years 2009 to 2000. *See* IRS, SOI, *The 400 Individual Income Tax Returns Reporting the Largest Adjusted Gross Incomes Each Year*, 1992–2009 (2009) (Table 1 – Net capital gains less loss in AGI), http://www.irs.gov/pub/irs-soi/09intop400.pdf.

31 Instructions for Form 1040, *U.S. Individual Income Tax Return* 105 (2012).

32 IRC § 1(h); Instructions for Form 1040, *U.S. Individual Income Tax Return* 105 (2012). Those married, but filing separately hit the maximum marginal rate when they earn over $194,175. *Id.*

33 IRC § 55(d)(3); Instructions for Form 6251, *Alternative Minimum Tax – Individuals* 9 (2012). The phase out begins at $75,000 for those who are married, but filing separately. *Id*.

34 In the AMT exemption phase-out range an additional $1,000 of income could reduce the exemption amount by $250, increasing the amount subject to the 28 percent rate to $1,250, and increasing the AMT by $350 ($1,250*28%=$350) or 35 percent. If the same dollars of income also trigger other phase outs on the return, then the marginal rate could exceed 35 percent.

35 *See* IRC §§ 56 and 57; Form 6251, *Alternative Minimum Tax – Individuals* (2012).

36 *See* TPC, *Characteristics of AMT Taxpayers, 2012–2014*, 2023, T13-0210 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?DocID=3969 (projecting that 4.1 percent of those with two children will be hit by AMT, as compared to 2.1 percent with no children for TY 2013).

37 *See id.*, (projecting that 4.3 percent of married joint filers will be hit by AMT in TY 2013, as compared to 0.8 percent of single filers).

The AMT penalizes those with high expenses.

An individual taxpayer must add back certain itemized deductions when computing AMT.[38] This requirement affects taxpayers with large expenses such as legal fees in court settlements, state and local taxes, or employee business expenses. Thus, the AMT may hit those with relatively high expenses and a reduced ability to pay.

The AMT treats seemingly similar deductions differently.

The AMT does not treat itemized deductions uniformly. A married couple with three children living in a high tax area or incurring high employee business expenses is more likely to owe AMT than a similar family that has other itemized deductions, such as deductions for mortgage interest or charitable contributions, which are deductible for AMT purposes.

EXAMPLE 3: The AMT treats similar itemized deductions differently. In 2012, a married couple with six children had combined wages of $125,000 and paid $20,000 in state and local taxes. This couple was subject to $1,309 in AMT. If they had incurred $20,000 in employee business expenses or job-related legal fees instead, the couple would have been subject to AMT of $684.[39] However, if the $20,000 in itemized deductions were a combination of $10,000 of mortgage interest and $10,000 of local taxes, they would not owe AMT, as shown on Table 1 (below). Therefore, even though the couple had the same total income and itemized deductions under the regular tax rules, the difference in treatment of taxes and deductions under the AMT would produce different liabilities.

TABLE 2.1.1, The AMT and Itemized Deductions

	Tax Year 2012: High Tax	Tax Year 2012: High EBE or Legal Fees	Tax Year 2012: Tax and Mortgage Interest Split
Filing Status	MFJ	MFJ	MFJ
Adjusted Gross Income (AGI)	$125,000	$125,000	$125,000
State and Local Taxes	$20,000		$10,000
Schedule A Miscellaneous		$20,000	
Mortgage Interest			$10,000
Tentative Minimum Tax	$12,025	$12,025	$9,425[40]
Regular Tax	$10,716	$11,341	$10,716
AMT	$1,309	$684	$0
Total Tax	**$12,025**	**$12,025**	**$10,716**

38 IRC § 56(b) and (e). Common itemized deductions that must be added back to income include, but are not limited to: state and local taxes, real estate and personal property taxes, mortgage interest not used for the purchase or improvement of a personal residence, medical expenses exceeding 7.5 percent but less than 10 percent of adjusted gross income, and certain miscellaneous itemized deductions such as employee business expenses and legal fees. *Id*.

39 Unreimbursed employee business expenses are generally deductible under the regular tax system, but not deductible under the AMT. *See, e.g.*, Treas. Reg. § 1.62-1T(e)(3) (employee business expenses); *Alexander v. IRS*, 72 F.3d 938 (1st Cir. 1995) (legal fees); IRC §§ 55 and 56 (AMT).

40 The tentative minimum tax was computed by taking $125,000 of taxable income, minus the $10,000 mortgage interest deduction allowable under the AMT, minus the $78,750 AMT exemption, leaving a taxable excess of $36,250, which was multiplied by the 26 percent AMT rate.

The AMT is complicated and burdensome.

Although the IRS has not measured the compliance costs of the AMT, it estimates that taxpayers spent over 18 million hours in 2000 completing and filing AMT tax forms or determining whether they needed to do so — more than 12 hours for each person who actually paid the AMT.[41] Other research from TY 2000 suggested that those who filed a Form 6251, *Alternative Minimum Tax – Individuals,* spent nearly double the time on their returns (13.7 hours for individuals and 56.6 hours for self-employed filers) than those who did not (24.6 hours for individuals and 97.3 hours for self-employed filers).[42] Thus, the AMT nearly doubles the burden of filing a federal income tax return. The following points illustrate some of the complexity of the AMT.

The AMT multiplies complexity and recordkeeping for owning and selling property.

Taxpayers must claim depreciation over different periods under the AMT. For example, if a taxpayer placed an office building into service prior to 1999 and is claiming straight-line depreciation, the taxpayer would depreciate it over a 39-year period for regular tax purposes.[43] For AMT purposes, the taxpayer would have to depreciate the building over a 40-year period instead.[44] Thus, the taxpayer would have to compute depreciation under both tax systems.

The portion of AMT attributable to timing items (such as depreciation) reflects the difference between when certain deductions are allowable under the AMT and when the same deductions are allowable under the regular income tax. As noted above, a taxpayer can only claim an AMT credit with respect to timing items in subsequent years when the regular tax exceeds the tentative minimum tax. Accordingly, the taxpayer must track his or her AMT credits.[45]

In addition, because depreciation deductions (and other tax adjustments that affect basis) may be different under the AMT, an asset may have a different tax basis under the AMT than for regular tax purposes.[46] A taxpayer's gain on the sale of property is computed as the difference between the amount realized on the sale (*e.g.*, the sale price) and its adjusted tax basis (*e.g.*, the amount paid, as adjusted for tax purposes).[47] As a result, selling a single asset could produce a different gain under each system. Thus, a taxpayer must keep two sets of books to track each asset's basis under each tax system.

41 Allen H. Lerman and Peter S. Lee, *Evaluating the Ability of the Individual Taxpayer Burden Model To Measure Components of Taxpayer Burden: The Alternative Minimum Tax as a Case Study*, 2004 IRS Research Conference 140, 151, 166 (Feb. 2005), http://www.irs.gov/file_source/pub/irs-soi/04lerman.pdf (estimating the AMT added 18.4 million hours in burden (including burden for those who did not owe AMT), and that between 1.4 and 1.5 million taxpayers actually had AMT liability or a reduced credit in TY 2000).

42 *See* John Guyton *et. al*., *Estimating the Compliance Cost of the U.S. Individual Income Tax*, NTA Symposium (2003) (Table 6), www.irs.gov/pub/irs-soi/toder.pdf. By comparison, the IRS estimates that it takes 13 hours, on average, to fill out the entire Form 1040, U.S. Individual Income Tax Return. Instructions for Form 1040, U.S. Individual Income Tax Return 102 (2012).

43 IRC § 168(c).

44 IRC § 56(a)(1)(A)(i) (referencing IRC § 168(g)).

45 IRC § 53.

46 *See, e.g.*, IRC §§ 56(a)(6), 1011, and 1012.

47 *See generally* IRC § 1011.

The AMT multiplies complexity and recordkeeping for the foreign tax credit.

In order to prevent double taxation of foreign earned income, a taxpayer generally may claim a foreign tax credit (FTC) to offset U.S. income tax liability for income taxes paid to a foreign country or U.S. possession.[48] A taxpayer may be required to claim a different amount of FTC under the AMT than under the regular tax system.[49] Unused foreign tax credits generally may be carried back one year and forward ten years.[50] Thus, in addition to requiring two sets of FTC computations each year, the AMT requires a taxpayer to track FTC carryovers for purposes of both the AMT and the regular tax system.

The AMT multiplies complexity and recordkeeping for tax credits.

Some credits are allowed under the AMT and some are not. When a credit is disallowed under the AMT, it may sometimes be carried over and used in another tax year. When credits may be carried over to other years, the carryover periods vary from item to item. Because different credit limitations and carryover periods apply to the AMT, the AMT multiplies the complexity and burden of these already-complicated rules. For example, a taxpayer cannot carry over an unused credit for placing a qualified electric vehicle into service.[51] If the taxpayer cannot use the credit in the year the vehicle is placed into service, he or she loses the credit. On the other hand, when the AMT limits general business credits, it usually allows the taxpayer to carry them back one year and forward 20 years.[52] By contrast, when the home mortgage interest credit is limited, it may be carried forward three years but may not be carried back.[53] Similarly, when the adoption assistance credit is limited, it may be carried forward five years but may not be carried back.[54] Not only do these complicated credit carryover rules vary widely, but they require taxpayers to track multiple types of credit carryovers from year to year under both the AMT and the regular tax systems.

The AMT creates a trap for the unwary by taxing paper gains on incentive stock options.

A taxpayer's exercise of incentive stock options (ISOs) creates paper (phantom) gain in the year the stock is purchased (the option exercise). The gain is the difference between the option price and the market value of the stock on the date the option is exercised to purchase the shares. This gain is not taxed under the regular tax rules but is taxed for AMT purposes.[55] Because paper gains can disappear before the taxpayer sells the stock or pays the tax — as they often do in a sharp economic downturn — some taxpayers are subject to AMT on phantom gains that they cannot pay (*i.e.*, the so-called "ISO-AMT problem"). While a taxpayer who is subject to AMT on the exercise of an ISO receives AMT credits, he or she generally cannot recover these credits very fast.[56] Congress has partially addressed the ISO-AMT problem by

48 IRC § 27 and 901.

49 *See* IRC § 59 and 904.

50 IRC § 904(c).

51 A credit may be carried to another taxable year only if the IRC expressly provides for it. In the case of the credit for placing a qualified electric vehicle into service, carryovers are not authorized. *See* IRC § 30(a).

52 IRC § 39(a).

53 *See* IRC § 26 and 25(e).

54 IRC § 23C.

55 *Compare* IRC § 422(c)(2) *with* IRC § 56(b)(3).

56 AMT credits generally can only be used in future years to the extent the taxpayer's regular tax liability exceeds his or her "tentative minimum tax" for the year. IRC § 53. Moreover, any AMT capital losses on a sale of the stock can only be offset against AMT capital gains plus $3,000 of ordinary AMT income per year. *See, e.g., Guzak v. U.S.*, 75 Fed. Cl. 304 (Feb. 15, 2007).

accelerating the availability of AMT credits taxpayers may claim in years before 2013, but the ISO-AMT problem remains a trap for the unwary.[57]

The AMT is less predictable than the regular tax system.

The complexity of the AMT makes it less predictable than the regular tax system. By one projection for tax year (TY) 2013, those who earn less than $200,000 and are hit by the AMT will be subject to an average effective marginal tax rate more than ten points higher, on average, than they would face under the regular tax system.[58] The AMT is so complicated that the IRS's wage withholding calculator does not even consider the AMT in determining how much taxpayers should withhold.[59] Many taxpayers first learn they are subject to the AMT only after preparing their returns, when it is too late to increase their withholding or estimated tax payments.

Taxpayers who do not withhold or pay enough estimated tax are subject to penalties. While we cannot determine how many taxpayers were subject to estimated tax penalties solely because of the AMT, IRS data show that for tax year 2012, about 18 percent of those subject to the AMT were liable for estimated tax penalties, as compared to four percent of individual taxpayers overall.[60] Some taxpayers cannot afford to pay their tax (or penalties) in one lump sum at the end of the year. Thus, the unpredictability of the AMT likely reduces voluntary compliance.[61]

EXPLANATION OF RECOMMENDATION

The National Taxpayer Advocate first recommended repeal of the AMT in her 2001 Annual Report to Congress and has consistently advocated for its repeal since then.[62] In 1999, Congress voted to repeal the individual AMT, but the legislation was vetoed.[63] The American Bar Association Section of Taxation, the American Institute of Certified Public Accountants Tax Division, and the Tax Executives Institute have

57 Congress partially addressed the ISO-AMT problem by providing that for tax years beginning before January 1, 2013, taxpayers may generally recover the AMT credits associated with ISO exercises over a two-year period. IRC § 53(e). It followed up with the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343 (2008), which abated any outstanding amounts attributable to unpaid ISO-AMT liabilities that remained unpaid as of October 3, 2008 — the date of enactment. IRC § 53(f). Although this legislation addressed the consequences of the ISO-AMT problem, it has expired.

58 *See* TPC, *Income Subject to Tax and Effective Marginal Tax Rates in the Regular Income Tax and the AMT among AMT Taxpayers, Current Law, 2012–2014*, T13-0214 (Aug. 26, 2013), http://www.taxpolicycenter.org/numbers/displayatab.cfm?Docid=3973&DocTypeID=1.

59 The calculator refers taxpayers to Publication 505. *See* IRS Withholding Calculator (Apr. 4, 2013), http://www.irs.gov/individuals/article/0,,id=96196,00.html ("CAUTION: If you will be subject to alternative minimum tax, self-employment tax, or other taxes; you will probably achieve more accurate withholding by following the instructions in Pub 505: Tax Withholding and Estimated Tax."). Publication 505 instructs taxpayers to project their AMT liability by filling out Form 6251 or the Alternative Minimum Tax Worksheet in the Form 1040A instructions, a daunting task that few are likely to undertake before the end of the year.

60 IRS Compliance Data Warehouse, Individual Returns Transaction File (IRTF) and Individual Master File (IMF), TY 2012 (Sept. 2013). The National Taxpayer Advocate has recommended legislation to waive the estimated tax penalty for those who pay at least 100 percent of the amount due for the prior year, are subject to a *de minimis* penalty, or are first-time estimated tax payors and have reasonable cause for the violation. National Taxpayer Advocate 2008 Annual Report to Congress vol. 2 30-35.

61 Studies suggest that unexpected tax liabilities reduce filing, payment, and reporting compliance. *See* National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, at 30-35 (summarizing various studies).

62 *See, e.g.*, National Taxpayer Advocate 2001 Annual Report to Congress 56-58; National Taxpayer Advocate 2001 Annual Report to Congress 166-177; National Taxpayer Advocate 2003 Annual Report to Congress 5-19; National Taxpayer Advocate 2004 Annual Report to Congress 383-385; *Blowing the Cover on the Stealth Tax: Exposing the Individual AMT: Hearing Before the Subcomm. on Taxation and IRS Oversight of the Senate Comm. on Finance*, 109th Cong. 367 (2005) (statement of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2006 Annual Report to Congress 3-5; *Alternative Minimum Tax: Hearing Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways & Means*, 110th Cong. 43 (2007) (statement of Nina E. Olson, National Taxpayer Advocate); National Taxpayer Advocate 2008 Annual Report to Congress 356-362; National Taxpayer Advocate 2012 Annual Report to Congress 24-33.

63 Taxpayer Refund and Relief Act of 1999, H.R. 2488, 106th Cong. (1999).

jointly called for its repeal.[64] The National Association of Enrolled Agents also advocated outright repeal or substantial restructuring of the AMT for individuals.[65] Similarly, both the 2005 Tax Reform Panel and the 2010 National Commission on Fiscal Responsibility and Reform (the Simpson-Bowles Commission) recommended repealing the AMT.[66] Leaders of both parties in both the House and Senate have also proposed repealing it.[67] For all of the reasons stated above, the National Taxpayer Advocate continues to recommend permanent repeal of the individual AMT.

64 American Bar Association Section of Taxation, American Institute of Certified Public Accountants Tax Division and Tax Executives Institute, *Tax Simplification Recommendations, reprinted at 2000 TNT 39-82* (Feb. 28, 2000).

65 *2003 Tax Return Filing Season and the IRS Budget for Fiscal Year 2004: Hearing before the House Ways and Means Subcommittee on Oversight*, 108th Cong. 94 (2003) (statement of Claudia Hill on behalf of the National Association of Enrolled Agents).

66 The President's Advisory Panel on Federal Tax Reform, *Simple, Fair, and Pro-Growth: Proposals to Fix America's Tax System* xvii (Nov. 2005), http://govinfo.library.unt.edu/taxreformpanel/final-report/index.html; The National Commission on Fiscal Responsibility and Reform, *The Moment of Truth: Report of the National Commission on Fiscal Responsibility and Reform*, 2010 TNT 231-35 sec. 2, fig. 7 (Dec. 3, 2010).

67 *See, e.g.*, Tax Reduction and Reform Act of 2007, H.R. 3970, 110th Cong. (2007) (sponsored by Rep. Charles Rangel, Chairman, House Committee on Ways and Means, though the bill limits the benefits of repeal to lower income taxpayers); Individual AMT Repeal Act of 2007, H.R. 1366, 110th Cong. (2007); Taxpayer Choice Act of 2007, H.R. 3818, 110th Cong. (2007); Individual AMT Repeal Act of 2009, H.R. 240, 111th Cong. (2009); End Tax Uncertainty Act of 2011, HR. 86, 112th Cong. (2011); Individual AMT Repeal Act of 2011, H.R. 547, 112th Cong. (2011); Jobs Through Growth Act, H.R. 3400, 112th Cong. (2011); American Opportunity and Freedom Act of 2012, H.R. 3804, 111th Cong. (2012); Individual Alternative Minimum Tax Repeal Act of 2007, S. 55, 110th Cong. (2007) (sponsored by Max Baucus and Chuck Grassley, Senate Finance Committee, Chairman and Ranking Minority member, respectively, among others); Invest in America Act, S. 14, 110th Cong. (2007); Individual Alternative Minimum Tax Repeal Act of 2007, S. 2293, 110th Cong. (2007); AMT Repeal and Tax Freedom Act, S. 2318, 110th Cong. (2007); Bipartisan Tax Fairness and Simplification Act of 2011, S. 727, 112th Cong. (2011).

LR #2 Broaden Relief from Timeframes for Filing a Claim for Refund for Taxpayers with Physical or Mental Impairments

PROBLEM

Congress has placed within the tax code a number of safeguards to ensure that taxpayers pay only the correct amount of tax. One of these safeguards is Internal Revenue Code (IRC) § 6511, which allows taxpayers to file a claim for a credit or refund of an overpayment. The taxpayer must file the claim within a specified time; if not, it is forgone.[1] Failure to file a timely claim for refund with the IRS also prevents a taxpayer from filing suit under IRC § 7422 to claim the refund in U.S. District Court or the Court of Federal Claims.[2]

Congress amended IRC § 6511 in 1998 by adding IRC § 6511(h), which suspends the running of the period for filing a claim for a refund where a taxpayer can show that he or she was financially disabled.[3] The provision was written in direct response to what many felt was an unfair outcome in the *Brockamp* case.[4]

The National Taxpayer Advocate understands the IRS's need for a legal standard that is practical in its application. However, the current, narrowly tailored provision fails to protect numerous taxpayers who lack the capacity to file a refund claim. The difficulties presented by the statute include requirements that:

- A qualifying taxpayer have a "medically determinable" physical or mental impairment. This limits other, potentially more valuable determinations from being considered, such as those of psychologists or clinical social workers.[5]
- The taxpayer be "unable" to manage his or her financial affairs as a result of a physical or mental impairment. This forces the individual making the determination to provide a global, "all or nothing," statement regarding the effect of the impairments, which is often contrary to how an impairment manifests itself.

These requirements have led the IRS to dismiss otherwise compelling evidence and have resulted in the denial of relief under IRC § 6511(h) to taxpayers who have lacked the capacity to file a refund claim. Such problems were intensified by the guidance issued under IRC § 6511(h), which further restricts what

1 Under IRC § 6511(a), a taxpayer must file a claim for credit or refund of an overpayment within 1) three years from the time the return was filed, or 2) two years from the time the tax was paid, whichever is later. If no return was ever filed by the taxpayer then the claim must be filed within two years of payment of the tax.

2 Under IRC § 6532, a refund suit cannot be brought before the earlier of six months after filing a refund claim or issuance of notice of disallowance of the claim.

3 Pub. L. No. 105-206, 112 Stat. 685 (July 22, 1998) amended IRC § 6511, adding (h) which provides that a person is financially disabled when he or she is "unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." Additionally, the statute expressly authorizes the IRS to establish the "form and manner" of the proof a taxpayer must furnish to establish financial disability. The procedures for claiming financial disability are set forth in Rev. Proc. 99-21, 1999-1 C.B. 960, and require a taxpayer to submit a certification signed by a physician.

4 *U.S. v. Brockamp*, 519 U.S. 347 (1997).

5 *See, e.g.*, *Green v. Comm'r*, T.C. Memo. 2009-105. Rev. Proc. 99-21, 1999-1 C.B. 960, references 42 U.S.C. § 1395x(r), which defines physician, thereby excluding other medical professionals, such as nurse practitioners and physician assistants. *See also Henry v. United States*, 98 A.F.T.R.2d (RIA) 8359 (N.D. Tex. 2006).

documentation the IRS can consider when evaluating the presence of qualifying impairment, and according to some observers is not a clear reflection of Congress's intent.[6]

IRC § 6511(h) should be revised to clarify that the impairment can be determined by a health professional, and that a qualifying disability includes one that materially limits an individual's management of his or her financial affairs, rather than only one that leaves the individual "unable to manage" these affairs. Such revisions would protect more taxpayers who lack the capacity to file a refund claim, while balancing the IRS's need to administer requests for relief.

EXAMPLE

An unmarried taxpayer filed his return and paid his tax liability on April 15, 2009, then discovered he had overpaid. In May of 2011, the taxpayer began suffering from depression after a highly stressful period at work. The taxpayer found it difficult to get out of bed and found it overwhelming to complete normal day-to-day tasks. The taxpayer had his rent automatically withdrawn from his checking account, and could usually pay utilities and other monthly bills online, although the payments were often late and sometimes missed. However, he was unable to conduct more complex financial matters, such as managing his investments or submitting claims to his health insurance provider. The taxpayer's impairment also left him unable to complete a refund claim and collect and organize the supporting documents. The most severe phase of the depression lasted for about 16 months. During this time, no one was authorized to act on the taxpayer's behalf in financial matters.

After recovering from the depression, the taxpayer filed a refund claim in September of 2012. The taxpayer attached to the claim a letter from his clinical psychologist, stating that during the time of the depression, the taxpayer was materially limited from managing his financial affairs. It went on to specify that even though the taxpayer was occasionally able to perform simple and easy tasks, because of his clinical depression he gave up on more complicated and difficult tasks or avoided them altogether.

Under the current IRC § 6511(h), the taxpayer would not be considered financially disabled because the determination did not specify that he was unable to manage financial affairs. Further, the determination letter was written by a psychologist and would not be considered a medical determination. Therefore, the refund claim would be barred.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend IRC § 6511(h)(2) to define a financially disabled individual as follows:

First, replace the existing requirement that the individual impairment be medically determinable with a provision that it be determined by a qualified medical or mental health professional. For this purpose, Congress should specify that a qualified medical or mental health professional is an individual who is

6 Rev. Proc. 99-21, 1999-1 C.B. 960. The National Taxpayer Advocate acknowledges that concerns raised in this legislative recommendation could also be at least partially alleviated by new guidance. *See* Bruce A. McGovern, *The New Provision for Tolling the Limitations Period for Seeking Tax Refund: Its History, Operation and Policy, and Suggestions for Reform*, 65 Mo. L. Rev. 797 (2000) (stating that "[a]lthough a physician's opinion is relevant to each of these issues, it should not be the sole evidence that the Service considers. Such exclusive reliance is contrary to congressional intent.").

licensed by the state in which he or she practices to provide direct medical or mental health treatment to another individual.

Second, replace the existing requirement that the impairment leaves the individual unable to manage his financial affairs with the requirement that the impairment materially limits the management of those affairs.

PRESENT LAW

Prior to 1998, IRC § 6511 made no allowance for late refund claims, and all claims for credit or refund of an overpayment had to be filed within 1) three years from the time the return was filed, or 2) two years from the time the tax was paid, whichever was later.[7] The harshness of this strict filing period was demonstrated by both the *Webb* and *Brockamp* cases, in which the taxpayers lacked the capacity to file refund claims within the proper period and argued that the statute of limitations should be equitably tolled.[8]

The Doctrine of Equitable Tolling

The equitable tolling doctrine prevents a statute of limitations from barring a claim if the claimant, despite diligent efforts, did not discover the injury or under the circumstances could not reasonably be expected to file the claim within the designated time period.[9] In *Irwin v. Dept. of Veterans Affair*s, 498 U.S. 1075 (1991), the Supreme Court held that when Congress has waived the government's sovereign immunity, thereby subjecting it to lawsuits, equitable tolling should be made applicable in the same way that it is applicable to private suits. Some speculated that equitable tolling might be expanded to situations such as those at issue in *Webb* and *Brockamp*. However, the Supreme Court in *Brockamp* and the Fourth Circuit Court of Appeals in *Webb* declined to toll IRC § 6511, despite the taxpayers' inability to comply with the statutory limitations period due to impairments. The rationale was that the requirements of IRC § 6511 were already set out with specificity.[10]

U.S. v. Brockamp

In *U.S. v. Brockamp*,[11] the taxpayer, who was 93 years old and demonstrating early signs of dementia, mailed a check to the IRS for $7,000, along with an application for an automatic extension of time to file his 1983 tax return. Despite his extension request, the taxpayer never filed a return for 1983. More than two years later, on July 15, 1986, the IRS transferred the $7,000 from the taxpayer's account into an "Excess Collection account."[12]

7 IRC § 6511(a). If no return was ever filed by the taxpayer then the claim must be filed within two years of payment of the tax.

8 *U.S. v. Brockamp*, 519 U.S. 347 (1997), and *Webb v. U.S.*, 850 F. Supp. 489 (E.D. Va. 1994).

9 *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996).

10 *Webb v. U.S.*, 66 F.3d 691 (4th Cir. 1995), *cert. denied*, 519 U.S. 1148 (1997), and *U.S. v. Brockamp*, 519 U.S. 347 (1997), which was decided shortly after *Webb*, are discussed in more detail in the text. The Supreme Court recently restated its position taken in Brockamp, albeit not in a tax case, in *Sebelius v. Auburn Reg. Med. Ctr.*, 133 S. Ct. 817 (2013). Specifically, a provision of a Medicare statute that set a 180-day limit for health care providers to file administrative appeals was not subject to equitable tolling, because the regulation implementing the provision was a permissible interpretation of the law.

11 *U.S. v. Brockamp*, 519 U.S. 347 (1997).

12 National Taxpayer Advocate 2006 Annual Report to Congress at 157. The Excess Collections File (XSF) is a cumulative file that reflects payments that cannot be identified or applied to a specific taxpayer account. Internal Revenue Manual (IRM) 5.19.10.2 (Oct. 15, 2012). The National Taxpayer Advocate has expressed concern in the past that the IRS routinely moves funds into the XSF with very little research or attempts to contact the taxpayer to ascertain whether a taxable return should be filed, and if so, where such funds should be applied.

On November 7, 1988, the taxpayer died intestate. During the administration of his estate, his daughter discovered the $7,000 payment and requested a refund. In a letter to the IRS, she characterized her father as "senile" and stated that he had mistakenly sent the check for $7,000 rather than $700. On March 27, 1991, the daughter filed a return for the taxpayer's 1983 liability. The IRS assessed $427 in taxes, and refused the refund request, based on the statute of limitations in IRC § 6511.

The daughter, on behalf of the estate, filed suit against the United States seeking the return of the money her father had paid, arguing the refund claim was not barred because the statute of limitations imposed by IRC § 6511 was equitably tolled due to the taxpayer's mental incompetence. The case ultimately went before the Supreme Court.

The Court unanimously ruled that Congress did not intend the "equitable tolling" doctrine to apply to the Code's time limitations for filing tax refund claims because the limitations in IRC § 6511 were set out with an unusual degree of specificity, indicating that Congress would have specified whether to expand the statute's limitations periods under circumstances such as these. The Court went on to say that "[t]o read an 'equitable tolling' exception into § 6511 could create serious administrative problems by forcing the IRS to respond to, and perhaps litigate, large numbers of late claims, accompanied by requests for "equitable tolling" which, upon close inspection, might turn out to lack sufficient equitable justification." The Court considered the potential impact of this administrative burden on the IRS and observed that Congress accepted occasional unfairness in individual refund claim cases in an effort to maintain a more workable tax enforcement system.

Webb v. U.S.

The taxpayer, a wealthy woman, entrusted the job of managing her financial affairs to her personal physician, a social acquaintance. Her physician retained an attorney to serve as his personal legal counsel. Over the next 14 years, they both physically and emotionally abused the taxpayer and confined her to bed under heavy sedation. During this period of abuse, the doctor and attorney induced the taxpayer to give them complete control of her day-to-day affairs. Each was granted power of attorney, which allowed them to further manipulate the taxpayer's financial affairs.[13]

After directing funds from the taxpayer to themselves, for their own personal benefit, both the physician and the attorney filed gift tax returns reporting the money as gifts from the taxpayer. In 1987, the fraudulent transfers were discovered after a friend intervened and helped the taxpayer break free. The taxpayer filed a refund claim seeking the return of the gift taxes paid. The IRS accepted the basis for the refund claim but denied claims made more than three years after the filing of the gift tax returns, since they were outside the statutory period for a claim. The taxpayer's estate brought suit, arguing that under the circumstances (*i.e.,* physical and emotional abuse and fraudulent transfers from the estate to the physician and attorney) the statute of limitations was equitably tolled. The District Court dismissed for lack of jurisdiction,[14] the Court of Appeals for the Fourth Circuit held that the *Irwin* case did not establish equitable tolling for tax refund suits,[15] and the Supreme Court denied certiorari. This left the taxpayer's estate with no way to retrieve the money wrongfully paid to the IRS.

13 *Webb v. U.S.*, 66 F.3d 691 (4th Cir. 1995).

14 *Webb v. U.S.*, 850 F. Supp. 489 (E.D. Va. 1994).

15 *Webb v. U.S.*, 66 F.3d 691 (4th Cir. 1995).

Congressional Response to the Webb and Brockamp Cases

In response to concerns in Congress and President Clinton's administration regarding the holding in *Brockamp*, Congress in 1998 carved out an exception to IRC § 6511(a) for taxpayers who are financially disabled. Specifically, the amendment suspended the running of the three- or two-year time period in IRC § 6511(a) during any period in which a taxpayer is financially disabled.[16] The amendment states that a person is financially disabled

> if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than [twelve] months.

Further, the amendment provides that a taxpayer must provide proof of such impairment in order for IRC § 6511(h) to apply.

The language in IRC § 6511(h) is similar to that used elsewhere in the tax code. For example, IRC § 22 (a credit for the elderly and permanently disabled) defines "permanent and total disability" as "any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than [twelve] months." It has been speculated that this definition was derived from the statute governing disability insurance payments.[17]

In April 1999, the IRS issued Revenue Procedure 99-21, providing guidance on what needs to be established to show that a taxpayer is financially disabled.[18] First, a taxpayer must provide a signed, written statement from a physician that sets forth:

- The name and a description of the taxpayer's physical or mental impairment;
- The physician's medical opinion that the impairment prevented the taxpayer from managing his or her financial affairs;
- The physician's medical opinion that the impairment either can be expected to result in death, or that it has lasted (or is expected to last) for a continuous time not less than 12 months; and
- To the best of the physician's knowledge, whether the taxpayer was prevented from managing his or her financial affairs during the specific time that the impairment persisted.

16 Representative Jennifer Dunn, a member of the House Ways and Means Committee at that time, considered offering a legislative proposal as an amendment to the 1996 Taxpayer Bill of Rights. This proposal would have included circumstances other than financial disability in which the period for filing a refund claim should be tolled, and did not require that the disability be medically determinable. *See* Ways-Means Approves Taxpayer Rights 2 Measure, Adds Intermediate Sanctions, Daily Report for Executives, Mar. 22, 1996, at G56, available in LEXIS, Legis library, Drexec file. Representative Dunn never offered her proposal as a formal amendment.

17 Bruce A. McGovern, *The New Provision for Tolling the Limitations Period for Seeking Tax Refund: Its History, Operation and Policy, and Suggestions for Reform*, 65 Mo. L. Rev. 797 (2000) hypothesized that the origins of the language can be traced back to Social Security Disability Insurance definition of disabled. *See* Pub. L. No. 89-97, 79 Stat. 286. As originally enacted in 1956, the Social Security Disability Insurance definition of disabled required that the individual's physical or mental impairment "be expected to result in death or to be of long-continued and indefinite duration." *See* Social Security Amendments of 1956, Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815 (codified as amended at 42 U.S.C. § 423(d)(1)(A) (1994)). The 1965 amendment changed this language to require that the impairment be one that "can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."

18 Rev. Proc. 99-21, 1999-1 C.B. 960.

The person signing the claim for credit or refund must also provide a written statement that no person, including the taxpayer's spouse, was authorized to act on behalf of the taxpayer in financial matters during the period of impairment.

REASONS FOR CHANGE

The National Taxpayer Advocate understands the need to set times in which certain actions must take place. These periods give a taxpayer an opportunity to act while providing finality to the tax system. However, ensuring that outcomes are fair, and that taxpayers truly have a genuine opportunity to take the critical action, is an essential component of a fair and just system. Ensuring that the taxpayer truly has an opportunity to file a refund claim is especially important, since filing a claim for refund is the taxpayer's very last opportunity to assert an overpayment. Once that period for claiming the refund has lapsed, the taxpayer can no longer retrieve the money and is barred from court.

Despite Congress's attempt to address the injustices illustrated by the *Webb* and *Brockamp* cases through IRC § 6511(h), the exception's narrowly tailored focus on a medically determinable impairment and the taxpayer's resulting inability to manage his or her financial affairs has failed to protect many taxpayers who lack the capacity to file a refund claim. The following cases illustrate the challenges imposed on taxpayers by this narrow provision, and its equally narrow interpretation by the IRS:

- *Pleconis v. IRS*:[19] The taxpayer sought to suspend the statute of limitations under IRC § 6511(h) for the time when he had undergone five back surgeries and two heart surgeries. In support of the request, the taxpayer submitted a physician statement that specifically said "[t]he surgeries, rehabilitation and pain medication could be expected to have an adverse effect on the patient's ability to carry about business and personal activities." The taxpayer's cardiologist also stated that, because of his medical condition, "there may be adverse effects on the patient's ability to carry out business and personal activities correctly." However, the district court held that these statements did not sufficiently satisfy the requirement that the taxpayer's injury actually prevented him from managing his financial affairs.
- *Redondo v. U.S.*:[20] The court found the evidence the taxpayer submitted failed to establish a "financial disability" under IRC § 6511(h) because the physician's statement failed to specifically state that Mr. Redondo was prevented from managing his financial affairs. Instead, the statement said that Meniere's disease and the taxpayer's clinical depression "made managing his daily living, finances, etc., extremely difficult."
- *Green v. Commissioner*:[21] The taxpayer was treated by a clinical psychologist, not a physician, and thus could not document a medically determinable impairment.

These cases illustrate the difficulties that the requirement of a medical determination from a physician can pose and the inappropriateness of requiring a physician to make a global, definitive statement that a taxpayer's impairment prevented him or her from managing financial affairs. The medically determinable

19 *Pleconis v. IRS*, 108 A.F.T.R.2d (RIA) 5704 (D.N.J. 2011). The taxpayer filed a joint return with his wife, and the district court further held that his wife was not financially disabled from filing the claim for refund.

20 *Redondo v. U.S.*, 112 A.F.T.R.2d (RIA) 6092 (Fed. Cir. 2013). The court held that, even if the evidence did comply with the financially disabled requirements (*i.e.*, the impairment prevented him from managing his financial affairs) the claim for refund was nevertheless untimely as it was submitted more than three years after the date the disability ended..

21 *Green v. Comm'r*, T.C. Memo. 2009-105.

requirement precludes use of other types of documentation that can show a taxpayer's impairment, such as a letter from a psychologist or a clinical social worker. Additionally, the proposed revision would obviate the global "all or nothing" statement, which is generally not compatible with the reality of how a disability affects an individual's life.

In many cases a disability can materially limit particular aspects of an individual's conduct, while leaving other aspects, especially the ability to perform simple tasks, untouched or impaired to a lesser degree. This is especially true for individuals who suffer from mental illness. For instance, for an individual suffering from depression, a simple, routine task may pose little anxiety, while a more difficult and complex task (*e.g.*, filing a refund claim) may trigger severe anxiety and be avoided altogether.[22] Thus, a severely depressed person may be able to muster enough energy to pay utility bills after receiving a notice that the utilities will be disconnected if the bills are not paid, but would leave more complex financial obligations unattended.[23] The proposed legislative change will permit the professional making the determination to more fully consider whether the disability affects the individual's ability to perform financial tasks similar to filing a claim for refund. Such a revision will free the professional to provide a statement where simple tasks can be performed, instead of feeling compelled to provide a global statement that he or she fears cannot be fully supported.

The IRS Is Administering Other Provisions Where It Has to Consider the Impact of a Physical or Mental Impairment.

Currently, various provisions require detailed analysis of how an impairment affects an individual's ability to perform and comply with tax obligations. For instance, penalties may be abated where a failure to act, such as failure to file a return or pay tax, was due to reasonable cause and not willful neglect.[24] Reasonable cause has been established in situations where the taxpayer was prevented from acting due to an impairment. For example, in *Wright v. Commissioner*, the court held that a stay in a hospital and a rehabilitation center for an injured leg during the time that the taxpayer's 2006 return was due, in conjunction with the fact that her financial documents were not easily accessible, was enough to establish reasonable cause.[25] The IRS argued that the taxpayer's ability to carry on negotiations with Nationwide Insurance during this time negated reasonable cause, but the court was not persuaded. Unlike the taxpayer showing financial disability under current IRC § 6511(h), this taxpayer did not have to show inability to manage his or her financial affairs due to a medical condition. Instead, the court considered whether the impairment affected the taxpayer's ability to comply with the filing requirement, and whether that failure was reasonable when accounting for the impairment.

Additionally, the IRS considers unique circumstances and weighs all the relevant facts of a case when considering a taxpayer's offer to compromise an outstanding liability on the basis of effective tax

22 Andrew M. Busch, Jonathan W. Kanter, Sara J. Landes, and Cristal E. Weeks, *The Nature of Clinical Depression: Symptoms, Syndromes, and Behavior Analysis*, Behav. Anal. 31(1): 1–21 (2008), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2395346/ (stating that "[d]epression is characterized as much by increased escape and avoidance repertoires as by reduced positive repertoires.").

23 *Walter v. U.S.*, 104 A.F.T.R.2d (RIA) 7761 (W.D. Pa. 2009). The taxpayer in this case suffered from extreme clinical depression for at least seven years and diabetes. The taxpayer's depression prevented him from paying bills timely. Although he did pay some bills on time (*i.e.*, within a month of receipt), he normally paid his bills one to two months late. Further, taxpayer often delayed paying bills until receiving second or third notices or threats to shut off electricity.

24 Treas. Reg. § 301.6651-1(c)(1). Reasonable cause exists when the taxpayer exercises ordinary business care.

25 *Wright v. Comm'r*, T.C. Memo. 2013-129.

administration (an ETA offer).[26] In fact, one of the situations where IRS guidance instructs employees to consider an ETA offer is when a taxpayer is incapacitated and unable to comply with tax laws.[27]

Further, the IRS is obliged to accept information from a variety of sources when verifying an impairment to hire an individual with a disability.[28] For instance, the Office of Personnel and Management permits agencies to accept statements, records, or letters from a Federal Government agency that issues or provides disability benefits, from a state vocational rehabilitation agency counselor, or from a private vocational rehabilitation or other counselor that issues or provides disability benefits, in addition to statements, records, or letters from a medical professional.[29]

As with grants of penalty abatement on the basis of reasonable cause, settlement of tax liabilities on the basis of effective tax administration, which rests on consideration of all facts and circumstances, and as with the hiring process for IRS employees with a disability, which permits consideration of various sources, the proposed revisions to IRC § 6511(h) would allow the individual making a determination a broader framework within which to consider how a physical or mental condition materially limited the taxpayer's ability to manage his or her financial affairs, particularly those financial affairs that are akin to filing a refund claim.

EXPLANATION OF RECOMMENDATION

The current, narrowly tailored exception has failed to protect some taxpayers who lack the capacity to file a refund claim. As has been acknowledged by legal scholars over the years, a better articulated exception with more breadth than the current one will better protect taxpayers.[30]

Replace the Medical Determination Requirement with a Requirement that the Impairment Be Determined by a Qualified Medical or Mental Health Professional.

Requiring that the determination as to the taxpayer's impairment be a medical one does not always result in IRS's receipt of the most accurate and useful information. For example, a taxpayer who is receiving regular counseling and treatment from a psychologist or a clinical social worker would be precluded from submitting a letter from either professional, because it would not be considered a medical determination under the law.[31] This means the taxpayer would have to obtain a letter from a physician who might be unfamiliar with his or her particular case. In all likelihood, the physician would have to base his or her opinion on the psychologist's or social worker's interactions with the taxpayer, rather than on first-hand knowledge. Since the physician would not be personally familiar with the case, the risk of a mischaracter-

26 IRC § 7122(a), and Treas. Reg. § 301.7122-1(b)(3)(ii). A liability may be compromised to promote effective tax administration (ETA) where compelling public policy or equity considerations provide a sufficient basis for compromising the liability. An ETA offer can only be considered where IRS has determined that the taxpayer does not qualify for an offer in compromise on the basis of doubt as to liability and doubt as to collectability.

27 IRM 5.8.11.2.2.1 (Sept. 23, 2008).

28 *Id.*

29 5 C.F.R. § 213.3102(u). For purposes of this regulation, a medical professional is an individual who is duly certified by a State, the District of Columbia, or a U.S. territory, to practice medicine. *See also* Office of Personnel and Management, Excepted Service — Appointment of Persons with Disabilities and Career And Career — conditional Employment Regulations, Question and Answers, *available at* http://archive.opm.gov/disability/appointment_disabilities.asp#3 (last visited Dec. 17, 2013).

30 *See, e.g.*, Keith Fogg, *Financial Disability for All*, Villanova Law/Public Policy Research Paper No. 2013-3009 (Nov. 30, 2012), *available at* http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=953107.

31 *Green v. Comm'r*, T.C. Memo. 2009-105. Rev. Proc. 99-21 references 42 U.S.C. § 1395x(r), which defines physician, thereby excluding other medical professionals, such as nurse practitioners and physician assistants. *See also Henry v. U.S.*, 98 A.F.T.R.2d (RIA) 8359 (N.D. Tex. 2006).

ization of the taxpayer's impairment increases, potentially resulting in an improper denial of relief. In this or similar situations, requiring a medical determination may prevent the IRS from having the most useful information on which to base its decision. The proposed change would permit the IRS to revise Revenue Procedure 99-21 to include professionals other than physicians, such as a licensed psychologist, a clinical social worker, or another trained mental health professional.

Replace the Unable to Manage Financial Affairs Requirement with a Requirement that Considers How the Impairment Materially Limited Management of Financial Affairs.

The current requirement that the taxpayer be "unable" to manage his or her financial affairs means that the supporting letter must make an "all or nothing" determination. Requiring such a statement places a large burden on the individual providing the determination letter, and may unnecessarily deter professionals from providing such a letter, since the letter could have unintended repercussions. Specifically, because the professional may know, or believe, that the individual is able to manage simple, easy financial tasks, he or she may feel barred from confidently stating that the taxpayer was unable to manage his or her financial affairs.[32] The proposed revision will allow the professional to more fully consider the nuances of the disability and how it affects management of financial affairs. This will allow the professional to consider the degree to which a taxpayer's ability to perform complex financial tasks (specifically, those tasks that are similar to filing a claim for refund) is impaired.

Replacing the requirement that the individual impairment be medically determinable with a provision that it be determined by a qualified medical or mental health professional and considering material limitations in place of inability will create an exception that more accurately reflects the circumstances and condition of taxpayers who are impaired from filing a refund claim.

32 Although Revenue Procedure 99-21 does limit the physician's statement to "the best of your knowledge," an individual who is confident that the disability prevented the taxpayer from filing a refund claim but believes, or knows, that the taxpayer can undertake less significant financial tasks would be deterred from providing a determination letter.

LR #3 Allocate to the IRS the Burden of Proving it Properly Imposed the Two-Year Ban on Claiming the Earned Income Tax Credit

PROBLEM

Internal Revenue Code (IRC) § 32(k) authorizes the IRS to ban taxpayers from claiming the earned income tax credit (EITC) for two years if the IRS determines they claimed the credit improperly due to reckless or intentional disregard of rules and regulations. Neither section 32 nor its regulations define the terms "reckless or intentional disregard," nor is there any judicial interpretation of the provision. However, the requisite state of mind goes beyond mere negligence.[1] IRS Chief Counsel guidance provides that if the IRS disallowed the EITC because the taxpayer did not respond (or did not respond adequately) to a request for substantiation of claimed EITC, the ban should not be imposed.[2]

The IRS routinely imposes the ban on taxpayers with whom it had no interaction and where there was no occasion to ascertain anything about the taxpayer's state of mind. The IRS often ignores the statutory requirements for imposing the ban, contravenes its own Chief Counsel guidance, and bypasses its own procedural safeguards to impose the ban.[3] A taxpayer may petition the Tax Court for review of the IRS's determination to impose the two-year ban, but the taxpayer may have the burden of proving the IRS imposed the ban improperly.[4]

EXAMPLE

M and F, an unmarried couple, lived together with their two children, ages 8 and 10, for all of 2011. M earned $30,000 in 2011 and F earned $35,000, but they did not share bank accounts and neither parent knew how much the other parent made. In 2012, the couple separated and F moved out of the family home. The children then resided equally with M and F, living alternate weeks with each parent. For tax purposes, the children were the "qualifying children" of both M and F in 2011, but F had the higher adjusted gross income and under the tie-breaker rules was entitled to the dependency deductions and EITC.[5] However, F told M that M could claim tax benefits, so M filed a separate 2011 return on which she claimed dependency deductions and approximately $4,000 of EITC, reducing her tax liability to zero. Unknown to M, F also claimed dependency deductions and EITC with respect to the children on his separate return for 2011.

The IRS audited M's return and disallowed the dependency deductions and EITC. M did not respond to the IRS's requests for documentation or participate in the audit because she inquired and learned that she was not entitled to benefits she claimed. She could not demonstrate that her adjusted gross income

1 See below for a discussion of IRC § 6662 and related regulations that define and distinguish "negligence," from a "reckless disregard" or "intentional disregard."

2 IRS SCA 200245051 (Nov. 8, 2002).

3 Most Serious Problem: *EITC: The IRS Inappropriately Bans Many Taxpayers From Claiming EITC, supra*.

4 Tax Court Rule of Practice and Procedure, 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

5 The applicable "tie breaker" rule of IRC § 152(c)(4)(B)(ii) provides that where more than one parent claims a qualifying child and the parents do not file a joint return together, if the child resides with both parents for the same amount of time during such taxable year, the child is the qualifying child of the parent with the highest adjusted gross income.

exceeded F's. The IRS asserted an accuracy-related penalty under IRC § 6662.[6] The IRS also imposed the two-year ban on M, so M cannot claim EITC in 2013 or 2014, even if her adjusted gross income exceeds F's in those years and she would otherwise be entitled to claim the credit.[7]

The maximum EITC for two qualifying children in 2012 was $5,236, and $5,372 for 2013.[8] If M petitions the Tax Court for review, the IRS will have the burden of showing that M negligently claimed the disallowed tax benefits and is liable for the section 6662 penalty. However, M may have the burden of proving the IRS erred in imposing the two-year ban, which if left in place potentially deprives her of more than $10,000 in tax benefits. She may be in a position of attempting to prove a negative — that her improper claim of EITC was not due to reckless or intentional disregard of rules and regulations.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend IRC § 32(k) to provide that the IRS has the burden of proof as to whether it is appropriate to impose the two-year ban on claiming EITC.

CURRENT LAW

IRC § 32(k)(1)(B)(ii) disallows EITC claims for two taxable years if there has been a final determination that the taxpayer's claim of credit was due to "reckless or intentional disregard of rules and regulations."[9] There is no statutory, regulatory, or judicial interpretation of section 32(k)(1)(B)(ii), but section 6662(b)(1), which imposes an accuracy-related penalty on certain underpayments due to "negligence or disregard of rules or regulations," contains and defines the same terms, either in the statute or in the related regulations. Section 6662(c) provides that "negligence" includes "any failure to make a reasonable attempt to comply with any provision of this title." The regulations under section 6662 provide that "reckless disregard" means "the taxpayer makes little or no effort to determine whether a rule or regulation exists, under circumstances which demonstrate a substantial deviation from the standard of conduct that a reasonable person would observe."[10] "Intentional disregard" exists "if the taxpayer knows of the rule or regulation that is disregarded."[11]

6 We note the dicta in *Rand v. Comm'r*, 141 T.C. No. 12, slip op. at 32 (Nov. 18, 2013), "it appears that Congress intended that the two-year bar be in lieu of any other monetary sanctions." Thus, while it is not clear that the Tax Court would sanction the imposition of the section 6662 penalty in addition to the two-year ban, the IRS is not explicitly prevented by statute from pursuing both.

7 F would also not be entitled to the credit under the tie-breaker rule of IRC § 152(c)(4)(A)(ii). IRC § 152(c)(4)(C), which permits another taxpayer to claim an individual as a qualifying child when the individual's parents may claim him or her but do not, does not apply. F and M's children would therefore not have the benefit of any EITC support.

8 EITC amounts for 2012 and 2013 are *available at* http://www.irs.gov/Individuals/Preview-of-2012-EITC-Income-Limits,-Maximum-Credit–Amounts-and-Tax-Law-Updates.

9 IRC § 32(k)(1)((B)(ii). IRC § 32(k) was enacted as part of the Tax Reform Act of 1997, Pub. L. No. 105-34, § 1085(a)(1), 111 Stat. 788, 956. IRC § 32(k(1)(B)(i) authorizes the IRS to impose a ten-year ban on taxpayers who fraudulently claim EITC, but the IRS imposes the ten-year ban infrequently (13 times, 27 times, and 17 times in 2009, 2010, and 2011 respectively). IRS Compliance Data Warehouse, *Individual Returns Transaction File* (Tax Years 2009, 2010, 2011).

10 Treas. Reg. § 1.6662-3(b)(2).

11 *Id*.

It is Not Clear Whether IRC § 7491 Shifts the Burden of Production to the IRS in Two-Year Ban Cases.

When the IRS audits a taxpayer's return and determines to disallow claimed EITC and impose the two-year ban, it issues a statutory notice of deficiency that includes notice of the IRS's determination to impose the ban.[12] The taxpayer may petition the Tax Court for review of the disallowed EITC as well as the determination to impose the ban.[13] Once in Tax Court, the taxpayer generally bears the burden of proof.[14] This "burden of proof" has two components. First, the taxpayer has the burden of coming forward with evidence (sometimes referred to as the burden of production). Second, the taxpayer must persuade the court that the evidence he or she submitted rises to the requisite level, such as the preponderance standard (sometimes referred to as the burden of persuasion).[15] Recognizing that "a taxpayer should not bear the burden of proving a negative (no unreported income) if the Commissioner can present no substantive evidence to support his deficiency claim," courts held that the burden of proof shifted to the IRS in some unreported income cases.[16] Consistent with this position, IRC § 7491, enacted as part of the IRS Restructuring and Reform Act of 1998, in subsection (b) shifts to the IRS the burden of proof in certain omitted income cases.[17] Additionally, subsection (c) of the statute shifts to the IRS the burden of production (and not the burden of persuasion) in penalty cases.[18] Thus, the IRS has the burden of producing evidence to show it properly imposed the IRC § 6662 accuracy-related penalty.

However, because the two-year ban on claiming EITC may not be a "penalty" for purposes of section 7491(c), it is not clear that the statute allocates to the IRS the burden of producing evidence that it was proper to impose the ban.[19] If section 7491(c) does not shift the burden to the IRS, the taxpayer contesting the ban will be required to produce evidence to prove a negative (that he or she did not claim the credit due to reckless or intentional disregard of rules and regulations), a requirement that is considered

12 The statutory notice of deficiency, authorized by IRC § 6212, informs the taxpayer of the additional amount of tax the IRS believes he or she owes and advises of the right to petition the Tax Court for review of that determination. IRM 4.19.14.6.1(6), (11) (Jan. 1, 2013); IRM 4.13.3.18 (Sept. 30, 2010).

13 *See, e.g., Garcia v. Comm'r*, T.C. Summ. Op. 2013-28 (Apr. 3, 2013) for the facts contained therein; under IRC § 7463(b), the opinion is not precedent for any other case.

14 Tax Court Rule of Practice and Procedure, 142(a); *Welch v. Helvering*, 290 U.S. 111, 115 (1933).

15 Bittker and Lokken, *Tax Court Trial Practice* (Revised), par. 115.4.2, Thomson Reuters Tax and Accounting (2013).

16 *See, e.g., Gatlin v. Comm'r*, 754 F.2d 921, 923 (11th Cir.1985) and cases cited therein.

17 IRC § 7491(b) provides "In the case of an individual taxpayer, the Secretary shall have the burden of proof in any court proceeding with respect to any item of income which was reconstructed by the Secretary solely through the use of statistical information on unrelated taxpayers." IRC § 6201(d) contains a similar provision: "In any court proceeding, if a taxpayer asserts a reasonable dispute with respect to any item of income reported on an information return filed with the Secretary under subpart B or C of part III of subchapter A of chapter 61 by a third party and the taxpayer has fully cooperated with the Secretary (including providing, within a reasonable period of time, access to and inspection of all witnesses, information, and documents within the control of the taxpayer as reasonably requested by the Secretary), the Secretary shall have the burden of producing reasonable and probative information concerning such deficiency in addition to such information return." IRC § 7491(a) also shifts the burden of proof to the IRS if, in a court proceeding, the taxpayer "introduces credible evidence with respect to any factual issue relevant to ascertaining the liability of the taxpayer for any tax imposed by subtitle A or B." However, in order for this provision to apply, IRC § 7491(a)(2)(A) requires that the taxpayer "complied with the requirements under this title to substantiate any item," which may not be possible where EITC was properly disallowed (although the ban was improperly imposed).

18 Pub. L. No. 105-206 § 3001, adding IRC § 7491. Subsection (c) provides "[n]otwithstanding any other provision of this title, the Secretary shall have the burden of production in any court proceeding with respect to the liability of any individual for any penalty, addition to tax, or additional amount imposed by this title." Allocating the burden of production to the IRS means "the Commissioner must come forward with sufficient evidence indicating that it is appropriate to impose the relevant penalty." The burden of persuasion remains with the taxpayer, however, so that "once the Commissioner meets his burden of production, the taxpayer must come forward with evidence sufficient to persuade a Court that the Commissioner's determination is incorrect." *Higbee v. Comm'r*, 116 T.C. 438 at 446, 447 (2001).

19 As noted, IRC § 7491(c) shifts the burden for any "penalty, addition to tax, or additional amount imposed by this title" (i.e., Title 26). IRC § 32 is found in Title 26, in Subtitle A, Chapter 1. Title 26, Subtitle F, Chapter 68 is captioned "Additions to the Tax, Additional Amounts, and Assessable Penalties." *See also Rand v. Comm'r*, 141 T.C. No. 12, slip op. at 31-32 (Nov. 18, 2013), noting "[t]o the extent an erroneously claimed credit reduces a tax liability, it may be subject to an accuracy-related penalty under section 6662; to the extent that credit generates a refund, it may be subject to a penalty under section 6676" and "it appears that Congress intended that the two-year bar be in lieu of any other monetary sanctions."

unfair in certain unreported income cases.[20] Even if section 7491(c) does apply to two-year bans, the statute does not shift the burden of persuasion to the IRS, but only the burden of production. The IRS would have the burden of producing evidence to show it properly imposed the ban, but the taxpayer would bear the burden of persuading a court that the IRS's determination was incorrect. If the evidence on both sides were equal, the IRS would win.

Other Code Provisions and Tax Court Rules Shift the Burden of Proof to the IRS in Cases that May Be Analogous to Two-Year Ban Cases.

IRC § 7491 is not the only Code section that shifts the burden of proof to the IRS. For example, a taxpayer is generally entitled to innocent spouse relief under IRC § 6015(c) unless he or she had actual knowledge of an erroneous item allocable to the other spouse that gave rise to an understatement of tax on a joint return.[21] The IRS has the burden of proof with respect to such knowledge.[22] Another example is IRC § 7430, which provides for the award of reasonable costs for an administrative or court proceeding under certain circumstances when the taxpayer is the prevailing party. The taxpayer is not a "prevailing party" within the meaning of the statute if "the United States establishes that the position of the United States in the proceeding was substantially justified," and the government has the burden of proof to show its position was substantially justified.[23] Still other Code sections shift the burden of proof to the IRS with respect to various issues relating to a taxpayer's state of mind or the reasonableness of a position.[24] The Tax Court's Rules of Practice and Procedure reflect several statutory burden allocations in addition to containing other burden-shifting provisions not mandated by statute.[25]

REASONS FOR CHANGE

The two-year ban authorized by IRC § 32 is unique in its temporal reach. A taxpayer who is subject to the ban but otherwise eligible for EITC is foreclosed from claiming it for two years following an audit in which EITC was disallowed. For this vulnerable population of low-income taxpayers, inappropriately being deprived of the credit for two years is a serious burden that may be difficult to relieve. These taxpayers

20 IRC §§ 7491(c), 6201(d).

21 IRC § 6015(c) provides "allocation" relief for understatements of tax for spouses who request relief when they are divorced, separated, widowed, or not living together, by allocating the liability between the spouses. IRC § 6015(c)(3)(C) provides that relief is not available where the spouse requesting relief had actual knowledge of the item that gave rise to the deficiency.

22 Treas. Reg. 1.6015-3(c)(2)(i) provides, "If, under section 6015(c)(3)(C), the Secretary demonstrates that, at the time the return was signed, the requesting spouse had actual knowledge of an erroneous item that is allocable to the nonrequesting spouse, the election to allocate the deficiency attributable to that item is invalid, and the requesting spouse remains liable for the portion of the deficiency attributable to that item. The Service, having both the burden of production and the burden of persuasion, must establish, by a preponderance of the evidence, that the requesting spouse had actual knowledge of the erroneous item in order to invalidate the election."

23 IRC § 7430(c)(4)(B)(i); *Center for Family Medicine v. U.S.*, 614 F.3d 937 (8th Cir. 2010). *See* H.R. Rep. 104-506 sec. 701(b) Burden of Proof on United States, accompanying Pub. L. No. 104-168, Taxpayer Bill of Rights 2, adding IRC § 7430(c). *See also* Joint Committee Print, Joint Committee on Taxation JCX -7-96, *Description of Amendment in the Nature of a Substitute to H.R. 2337 'Taxpayer Bill of Rights 2' Scheduled for Markup by the House Committee on Ways and Means on March 21,1996* (Mar. 20, 1996) explaining "The proposal would provide that, once a taxpayer substantially prevails over the IRS in a tax dispute, the IRS has the burden of proof to establish that it was substantially justified in maintaining its position against the taxpayer. This would switch the current procedure, which places the burden of proof on the taxpayer to establish that the IRS was not substantially justified in maintaining its position. Therefore, the successful taxpayer would receive an award of attorney's fees unless the IRS satisfies its burden of proof."

24 *See, e.g.*, I.R.C. § 7454(a) (providing "[i]n any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary."); IRC.§ 7429(g)(1)(in a judicial proceeding the IRS has the burden of proof as to whether certain levies, jeopardy assessments, or termination assessments were reasonable).

25 *See, e.g.*, Tax Court Rule of Practice and Procedure 142(b) (allocating to the IRS the burden of proof as to fraud and requiring a "clear and convincing" level of evidence); Rule 142(d) (allocating to the IRS the burden of proof as to transferee liability); Rule 232(e) (allocating to the IRS the burden of proof as set forth in IRC § 7430, including IRC § 7430(c)(4)(B). For circumstances in which the Tax Court places the burden of proof on the IRS other than in situations covered by statute, see Rule 142(a) (allocating the burden of proof to the IRS as to new matters not included in a notice of deficiency, increases in the asserted deficiency, and affirmative defenses).

may be intimidated and fearful of protesting the IRS's treatment of them. They may not understand they have been wronged when the IRS imposes the ban without following the statutory requirements, and consequently they may not seek assistance they need, such as from Low Income Taxpayer Clinics. The disallowance of the EITC in the audit year may also trigger other penalties, but the amount of foregone EITC in the later two years may far exceed those other penalties. Yet while it is clear that the IRS has the burden of production with respect to penalties, it is not clear whether the IRS has any burden of proof as to the two-year ban.

Actual experience with the two-year ban has demonstrated that the IRS imposes it inappropriately. Routinely and automatically, the IRS imposes the ban in cases where it has not interacted with the taxpayer and therefore no basis on which it could "determine," as the statute requires, that the taxpayer acted with "reckless or intentional disregard of rules and regulations." Clarifying that the IRS has the burden of proof in two-year ban cases is a logical remedial step.

EXPLANATION OF PROVISION

The proposal would amend IRC § 32(k) to clarify that the IRS has the burden of proof when proposing to impose the two-year ban on claiming EITC. Consequently, the IRS would be required to produce evidence of the taxpayer's reckless or intentional disregard of rules and regulations and persuade the court that imposition of the ban would be appropriate.

LR #4 PREMIUM TAX CREDIT: Adjust the Affordability Threshold Based on Type of Coverage

PROBLEM

Under a Treasury Regulation implementing the Affordable Care Act (ACA),[1] an employee's family may be ineligible for the premium tax credit if the cost of health insurance to cover just the employee (self-only) is affordable, even though the employee must pay more to cover him- or herself and family members (family coverage).

EXAMPLE

An employer offers health insurance for an annual employee contribution of $999 to cover only the employee, or $4,565 to cover the employee's whole family. Even if the household's income is as little as $10,500, the rules deem this offer of employer coverage affordable. Family coverage could cost almost half of the household income, but a 9.5-percent affordability threshold refers to the cost of self-only coverage — regardless of which type of insurance the employee actually needs.[2] Assuming the employer health plan is affordable, the employee (and family) are ineligible for the premium tax credit, which otherwise subsidizes those who may be unable to afford health care.

RECOMMENDATION

Clarify that the 9.5-percent affordability threshold pertains to the type of insurance needed to cover the employee and, if applicable, the employee's spouse and dependents, whether self-only or family coverage.

PRESENT LAW

Generally, the ACA allows a refundable tax credit to low and moderate-income individuals to subsidize premiums at a legislatively-created health insurance marketplace "Exchange."[3] This premium tax credit creates affordable coverage for those who may otherwise go without insurance. If an employer offers health insurance coverage to its employees and the employees' family members, and the insurance meets certain minimum value standards, then employees and their family members are eligible for a premium tax credit only if the health plan offered by the employer is unaffordable.

In turn, the relevant statute states that an employer-sponsored plan is unaffordable "if the employee's required contribution (within the meaning of section 5000A(e)(1)(B)) with respect to the plan exceeds 9.5 percent of the applicable taxpayer's household income."[4] A Notice of Proposed Rule-making (NPRM) explained:

1 See Patient Protection & Affordable Care Act of 2009, Pub. L. No. 111-148, 124 Stat. 119 (Mar. 23, 2010), as amended by the Health Care & Educ'n Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).

2 See Treas. Reg. § 1.36B-2(c)(3)(v)(C).

3 See Internal Revenue Code (IRC) § 36B.

4 IRC § 36B(c)(2)(C)(i)(II).

> The cross-referenced section 5000A(e)(1)(B) defines the term "required contribution" for this purpose as "the portion of the annual premium which would be paid by the individual * * * for self-only coverage." Thus, the statutory language specifies that for both employees and others (such as spouses or dependents) who are eligible to enroll in employer-sponsored coverage by reason of their relationship to an employee (related individuals), the coverage is unaffordable if the required contribution for "self-only" coverage (as opposed to family coverage or other coverage applicable to multiple individuals) exceeds 9.5 percent of household income. * * *
>
> Consistent with these statutory provisions, the proposed regulations provide that an employer-sponsored plan also is affordable for a related individual for purposes of section 36B if the employee's required contribution for self-only coverage under the plan does not exceed 9.5 percent of the applicable taxpayer's household income for the taxable year, even if the employee's required contribution for the family coverage does exceed 9.5 percent of the applicable taxpayer's household income for the year.[5]

To support this interpretation, the NPRM quoted a statement of the Joint Committee on Taxation (JCT): "Unaffordable is defined as coverage with a premium required to be paid by the employee that is more than 9.5 percent of the employee's household income, based on the self-only coverage."[6] The relevant substance of the NPRM was finalized by a Treasury Decision (TD).[7] As a result, an employee and his or her spouse and dependents may be ineligible for the premium tax credit because self-only coverage is affordable, even if the employee must pay more than 9.5 percent of household income to cover the him- or herself and family.

REASONS FOR CHANGE

As a logical matter, the affordability threshold creates a disjunct between a stipulated amount and the actual cost of family coverage. Illogical provisions, which run contrary to intuitive behavior, make tax administration difficult. As a practical matter, disqualification from the premium tax credit makes it harder for families to obtain health insurance.

According to health-care industry analysts, average annual premiums for employer-sponsored plans in 2013 were $5,884 for self-only and $16,351 for family coverage.[8] The employee's share was on average $999 and $4,565, respectively.[9] Under the Treasury Regulation, $4,565 is affordable since $999 is less than 9.5 percent of household income. Researchers also stated that:

> there are about 3.9 million non-working dependents in families … in which the worker has access to affordable employer-sponsored coverage but the family does not. Under the draft regulation [now finalized], these family members would be excluded from getting federal tax

5 NPRM, 76 Fed. Reg. 50931, 50935 (Aug. 17, 2011).

6 JCT, *General Explanation of Tax Legislation Enacted in the 111th Cong.*, JCS–2–11 (Mar. 2011) at 265.

7 *See* TD 9590, 77 Fed. Reg. 30377 (May 23, 2012).

8 Kaiser Family Foundation, *Employer Health Benefits*, 2013 Ann'l Survey 12, available at http://kff.org/private-insurance/report/2013-employer-health-benefits/ (last visited Sept. 9, 2013).

9 *Employer Health Benefits*, 2013 Ann'l Survey 67; *see also* Rob't Pear, *Federal Rule Limits Aid to Families Who Can't Afford Employers' Health Coverage*, N.Y. Times (Jan. 30, 2013).

> credits to help them buy coverage in health insurance exchanges. On average they'd have to pay 14% of their income to opt into the employer coverage, substantially more than what they would pay in an exchange.[10]

Similarly, the Government Accountability Office (GAO) reported:

> The proposed affordability standard [now finalized] could potentially affect significantly more children than the approximately 460,000 uninsured children we estimated above under certain scenarios … we estimate that an additional 1.9 million children who would otherwise be eligible for C[hildren's] H[ealth] I[nsurance] P[rogram] would be considered to have access to affordable insurance under this [now finalized] proposed standard and would be ineligible for the premium tax credit.[11]

In sum, the threshold as written deems insurance affordable even if that is not the economic reality.

EXPLANATION OF RECOMMENDATION

In view of the illogical and impractical affordability threshold, editorial writers have opined: "The ideal solution would be for Congress to clarify that the 9.5 percent calculation is based on a family plan, and that dependents can get subsidies on the exchanges if there is no affordable coverage at work."[12] Under the recommendation, the affordability threshold would refer to the level of coverage the employee needs.[13] If the employee purchases self-only coverage because he or she has no spouse or dependents, or they are eligible for coverage elsewhere, the affordability threshold would be based on the self-only premium. Otherwise, the threshold would be based on the cost of family coverage.

10 Larry Levitt & Gary Claxton, *Measuring the Affordability of Employer Health Coverage*, Kaiser Family Foundation (Aug. 24, 2011), *available at* http://kff.org/health-costs/perspective/measuring-the-affordability-of-employer-health-coverage/ (last visited Sept. 9, 2013).

11 GAO, *Children's Health Insurance: Opportunities Exist for Improved Access to Affordable Insurance*, GAO-12-648 (June 2012) 14.

12 *A Cruel Blow to American Families*, N.Y. Times (Feb. 2, 2013).

13 This would be consistent with an earlier explanation of the legislation. *See* JCT, *Technical Explanation of the Revenue Provisions of the "Reconciliation Act of 2010," as Amended, in Combination with the "Patient Protection And Affordable Care Act,"* JCX-18-10 (Mar. 21, 2010) 14 ("Unaffordable is defined as coverage with a premium required to be paid by the employee that is 9.5 percent or more of the employee's household income, based on the type of coverage applicable (*e.g.*, individual or family coverage).").

LR #5 TUITION REPORTING: Allow TIN Matching By Colleges

PROBLEM

Although the tax code requires colleges and universities to file information returns with the IRS reflecting tuition from students,[1] the law does not permit these eligible educational institutions to verify Taxpayer Identification Numbers (TINs) with the IRS prior to filing.[2] Unlike other information return filers who can perfect TINs once the IRS advises them of any errors, colleges and universities must rely on student input while still facing penalties for errors. In tax year 2012, the IRS could not validate over 22,000 TINs on information returns for more than 24 million individuals on Form 1098-T, *Tuition Statement*.[33]

EXAMPLE

University X charges or receives tuition from 60,000 students, from whom the registrar solicits TINs. University X accepts this student information to prepare 60,000 Forms 1098-T, which it duly files with the IRS. Upon filing, the IRS finds that 15,000 of the TINs do not match the students' names, whether due to transposition errors, name changes, or otherwise. As a result, University X faces $1.5 million in penalties. If University X also includes the incorrect TINs on statements it furnished the students, it could potentially be liable for an additional $1.5 million in penalties.

RECOMMENDATION

Allow colleges and universities to verify TINs with the IRS prior to filing annual information returns on tuition payments.

PRESENT LAW

Generally, colleges and universities must file with the IRS annual information returns reflecting tuition paid or amounts billed.[4] These eligible educational institutions use Form 1098-T, *Tuition Statement*, which identifies the student by name, address, and TIN. These tuition statements facilitate the administration of education credits and deductions that depend on tuition paid.[5]

The penalty for failure to file a correct information return is generally $100, and the penalty for failure to furnish a correct payee statement is also generally $100.[6] The IRS will not impose the penalty if the filer shows the failure was due to reasonable cause and not willful neglect.[7] If a college reports an incorrect TIN on Form 1098-T due to inaccurate input from the student, the college may obtain a penalty waiver

1 Internal Revenue Code (IRC) § 6050S.

2 IRC § 6050S(e) defines "eligible educational institution" by cross-reference to IRC § 25A(f)(2), which in turn cross-references the Higher Education Act of 1965, 20 U.S.C. § 1088.

3 *See* IRS Compliance Data Warehouse, Info. Returns Master File.

4 *See* IRC § 6050S. The college must supply a copy to the student (payee statement).

5 *See* IRC §§ 25A, 222.

6 *See* IRC §§ 6721, 6722.

7 *See* IRC § 6724.

upon proving reasonable cause. The college must establish that the failure to include a correct TIN was due to events beyond its control and that it acted in a responsible manner by soliciting a TIN from the student.[8]

In the case of an individual, a TIN generally is the Social Security number (SSN).[9] For an individual not eligible for an SSN who has a federal tax reporting requirement, the IRS assigns an Individual Taxpayer Identification Number (ITIN).[10]

Regarding information returns that report payments subject to backup withholding, such as dividends or other income, the tax law allows the payor, before filing the return, to verify with the IRS the TIN furnished by the payee.[11] As a mechanism, the payor transmits name/TIN combinations through the IRS online interactive or bulk TIN Matching Program, accessible 24 hours a day, seven days a week.[12] The IRS matching response is generally limited to notification of a match or mismatch.[13] If the IRS response indicates a TIN mismatch, the payor has the opportunity to resolve the inaccuracy with the payee, prior to filing an information return. Otherwise, the IRS generally may not disclose a taxpayer's name, TIN, or other return information.[14]

REASONS FOR CHANGE

Currently, the tax law authorizes the IRS TIN Matching program only for payors of reportable payments subject to backup withholding. Thus, it excludes colleges reporting tuition received (or billed), not making reportable payments subject to backup withholding (*i.e.* not paying income). Nevertheless, as a practical matter, colleges have an information reporting requirement for which they need to verify TINs. TINs may not match a student's name for various reasons, such as transposition errors or name changes. To allow the IRS to alert eligible educational institutions of mismatches to resolve with students prior to filing information returns, Congress should expand the TIN Matching beyond the currently authorized program. This recommendation benefits the IRS, information return filers, and students by facilitating accurate reports.

8 *See* Treas. Reg. §§ 1.6050S-1(e)(3); 301.6724-1.

9 *See* IRC § 6109.

10 *See* Treas. Reg. § 1.6109-1(d).

11 *See* IRC § 3406; Treas. Reg. § 31.3406(j)-1; Rev. Proc. 2003-9, 2003-8 I.R.B. 516.

12 *See* IRS Pub. 2108A, *On-line Taxpayer Identification Number (TIN) Matching Program*.

13 The TIN Matching Program provides a numerical response indicator for each match request. The potential responses include: '0' - Name/TIN combination matches IRS records; '1' - Missing TIN or TIN not 9-digit numeric; '2' - TIN not currently issued; '3' - Name/TIN combination does NOT match IRS records; '4' - Invalid request (*i.e.*, contains alphas, special characters); '5' - Duplicate request; '6' - (Matched on SSN), when the TIN type is (3), unknown, and a matching TIN and name control is found only on the NAP DM1 database; '7' - (Matched on EIN), when the TIN type is (3), unknown, and a matching TIN and name control is found only on the EIN N/C database; '8' - (Matched on SSN and EIN), when the TIN type is (3), unknown, and a matching TIN and name control is found on both the NAP DM1 and the EIN N/C databases. IRS Pub. 2108A, *On-line Taxpayer Identification Number (TIN) Matching Program* § 14, FAQ-9 at 9.

14 *See* IRC § 6103. *See also* National Taxpayer Advocate 2003 Annual Report to Congress 232 (Legislative Recommendation: *Confidentiality and Disclosure of Returns and Return Information*). Third-party payors and their authorized agents who participate in the TIN Matching Program must sign an on-line Terms of Agreement (TOA) clause stating they will attempt to match name/TIN combinations only for the types of reportable payments listed in Rev. Proc. 2003-9. IRS Pub. 2108A, *On-line Taxpayer Identification Number (TIN) Matching Program* § 4.3 at 4.

EXPLANATION OF RECOMMENDATION

In general, information returns allow the IRS to cross-check taxpayer claims against third-party reports. In the case of education credits and deductions that depend on tuition paid, Form 1098-T may facilitate tax administration.[15]

In 2011, the Treasury Inspector General for Tax Administration (TIGTA) published an audit report concerning Form 1098-T in the context of apparently erroneous education credits.[16] According to the report, based in part on analysis of Forms 1098-T, 2.1 million individuals received potentially erroneous education credits because they:

- Did not attend an eligible educational institution;
- Attended less than half time or were graduate students;
- Were dependents on another taxpayer's return; or
- Were incarcerated.[17]

In response to the report, the IRS observed that

> there are legitimate reasons why the information on the Form 1098-T could be different from the amount of credit allowed to the taxpayer. For example, timing differences can occur that will cause the reporting of all expenses on Form 1098-T in one year, when the student is required to claim the credit over two tax years. In addition, students whose tuition was fully paid through scholarships would not receive Form 1098-T, although they may have related expenses, such as course materials not purchased through the educational institution, which would qualify for the credit.[18]

Nevertheless, the IRS agreed with TIGTA's recommendation to "systemically identify and reject documents using incorrect coding on Form 1098-T for TY 2011" and to "identify educational institutions that are preparing inaccurate Forms 1098-T and then determine the appropriate treatment."[19]

Since enactment over the past decade and a half, the tax statutes have required a TIN on Form 1098-T, to match against claimed education credits and deductions.[20] Because the IRS TIN Matching program is not available for filers of Form 1098-T, colleges essentially must await a penalty notice to discover that a student has supplied an inaccurate number.[21] By extending TIN Matching to Form 1098-T, the recommendation reduces unnecessary burden and work for eligible educational institutions, the IRS, and taxpayers.

15 As stated above, IRC § 6050S(b)(2)(B)(i) permits reporting either payments received or amounts billed. To the extent that Form 1098-T reports not tuition paid but amounts billed, its utility may be limited.

16 *See* TIGTA, Ref. No. 2011-41-083, *Recovery Act: Billions of Dollars in Education Credits Appear to Be Erroneous* (Sept. 16, 2011).

17 *See id*. at 3 (relating to TY 2009 through May 28, 2010).

18 TIGTA, Ref. No. 2011-41-083, *Recovery Act: Billions of Dollars in Education Credits Appear to Be Erroneous* at 34 (IRS response).

19 *Id*. at 14.

20 *See* IRC §§ 25A(g) & 6050S(b), enacted by the Taxpayer Relief Act of 1997, Pub. L. No. 105-34, §§ 201 & 202, 111 Stat. 788, 799-809 (Aug. 5, 1997); IRC § 222, enacted by the Econ. Growth & Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 431, 115 Stat. 38, 66 (June 7, 2001).

21 On Dec. 17, 2013, the IRS stated that for "tax year 2011, the IRS introduced Forms … 1098-T … into the penalty notice program. * * * in the interest of providing good customer service and encouraging voluntary compliance, the IRS will waive penalties associated with Forms 1098-T … for this introductory year." Servicewide Electronic Research Program (SERP) Alert No. 13A0623.