

INTRODUCTION: Legislative Recommendations

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

The chart immediately following this Introduction summarizes congressional action on recommendations the National Taxpayer Advocate proposed in her 2001 through 2013 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 highlights legislative activity during the 113th Congress relating to the National Taxpayer Advocate's proposals.

During the 113th Congress, the Senate Committee on Finance and the House Committee on Ways and Means both developed session drafts on proposed tax reform legislation that contained proposals similar to ones recommended by the National Taxpayer Advocate in her Annual Reports to Congress.² The proposed legislation included the following:

- Repeal the Alternative Minimum Tax;³
- Require returns of partnerships made on the basis of the calendar year to be filed on or before March 15th following the close of the calendar year, and returns made on the basis of a fiscal year to be filed on or before the 15th day of the third month following the close of the fiscal year;⁴

- 1 An electronic version of the chart is available on the TAS website at www.TaxpayerAdvocate.irs.gov/2014-Annual-Report. 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 H. COMM. ON WAYS AND MEANS, *Tax Reform Act of 2014: Discussion Draft Section-by-Section Summary* (Feb. 26, 2014), available at http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf, and S. COMM. ON FIN., *Proposal to Combat Tax Fraud, Make Filing Safer, Simpler and More Efficient* (Nov. 20, 2013), available at <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Language.pdf>.
- 3 H. COMM. ON WAYS AND MEANS, *Tax Reform Act of 2014: Discussion Draft Section-by-Section Summary*, § 2001 (Feb. 26, 2014), available at http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf. See also National Taxpayer Advocate 2013 Annual Report to Congress 292-301, at 293 (Legislative Recommendation: *Repeal the Alternative Minimum Tax*) (recommending the complete repeal of the Alternative Minimum Tax); National Taxpayer Advocate 2008 Annual Report to Congress 356-62, at 361-62 (Legislative Recommendation: *Repeal the Alternative Minimum Tax for Individuals*) (recommending the repeal of the alternative minimum tax for individuals); National Taxpayer Advocate 2004 Annual Report to Congress 383-85 (Key Legislative Recommendation: *Alternative Minimum Tax*) (recommending the repeal of provisions relating to the Alternative Minimum Tax); National Taxpayer Advocate 2001 Annual Report to Congress 166-77, at 168, 175 (Key Recommendations: *Alternative Minimum Tax for Individuals*) (recommending the repeal of IRC §§ 55, 56, 57, 58, and 59 which pertain to the Alternative Minimum Tax for individuals; or, in the alternative, the individual Alternative Minimum Tax Exemptions should be indexed for inflation).
- 4 H. COMM. ON WAYS AND MEANS, *Tax Reform Act of 2014: Discussion Draft Section-by-Section Summary*, § 6201 (Feb. 26, 2014), available at http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf. See also National Taxpayer Advocate 2003 Annual Report to Congress 302-07, at 303 (Key Legislative Recommendation: *Filing Due Date of Partnership and Certain Trusts*).

- Permit a qualifying, newly incorporated small business to elect to be treated as an S corporation for any taxable year if the business makes such an election on a timely filed Form 1120S, *U.S. Income Tax Return for an S Corporation*;⁵
- Suspend the period to file a petition with the U.S. Tax Court for judicial review of determination of spousal relief while a person is prohibited by a bankruptcy stay from filing such a petition, and for 60 days thereafter;⁶
- Permit organizations that unsuccessfully seek recognition of IRC § 501(c)(4) exempt status to seek declaratory judgments;⁷
- Provide a safe harbor for *de minimis* errors on information returns and payee statements;⁸
- Develop an Internet platform for Form 1099 filings;⁹
- Require that electronically prepared paper returns include scannable codes;¹⁰
- Grant the IRS the authority to regulate federal income tax return preparers;¹¹

5 H. COMM. ON WAYS AND MEANS, *Tax Reform Act of 2014: Discussion Draft Section-by-Section Summary*, § 3606 (Feb. 26, 2014), available at http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf. See also National Taxpayer Advocate 2010 Annual Report to Congress 410-11, at 411 (Legislative Recommendation: *Extend the Due Date for S Corporation Elections to Reduce the High Rate of Untimely Elections*). 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 timely filed (including extensions) Form 1120S, *U.S. Income Tax Return for an S Corporation*.

6 H. COMM. ON WAYS AND MEANS, *Tax Reform Act of 2014: Discussion Draft Section-by-Section Summary*, § 164 (Feb. 26, 2014), available at http://waysandmeans.house.gov/uploadedfiles/ways_and_means_section_by_section_summary_final_022614.pdf. See also National Taxpayer Advocate 2006 Annual Report to Congress 429-30 (Additional Legislative Recommendations: *Innocent Spouse Relief Fixes*) (recommending to suspend the period for filing a petition in Tax Court to obtain judicial review of an innocent spouse determination while a bankruptcy stay is in effect and for 60 days thereafter).

7 See National Taxpayer Advocate Special Report to Congress: *Political Activity and the Rights of Applicants for Tax-Exempt Status* 16 (June 2014). In a special report to Congress the National Taxpayer Advocate recommended that Congress consider legislation to provide applicants for exemption under IRC § 501(c)(4) with the ability to seek a declaratory judgment if denied or unanswered after nine months so that more judicial guidance can develop. Also, a declaratory judgment permits an organization to challenge in court a revocation of its exempt status or an IRS determination that it is a private foundation, rather than a public charity, before the assessment of any income taxes that might result from the loss of exempt status or any excise taxes that might result from the reclassification to a private foundation.

8 S. COMM. ON FIN., *Proposal to Combat Tax Fraud, Make Filing Safer, Simpler and More Efficient*, § 2 (Nov. 20, 2013), available at <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Language.pdf>. See also National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, § 5, at 69, 89, 91, 96 (Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*). However, the proposal is for \$25, rather than \$50 as recommended by the National Taxpayer Advocate.

9 *Id.*

10 *Id.*

11 S. COMM. ON FIN., *Proposal to Combat Tax Fraud, Make Filing Safer, Simpler and More Efficient*, § 19 (Nov. 20, 2013), available at <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Language.pdf>. See also National Taxpayer Advocate 2013 Annual Report to Congress 61-74, at 62, 74 (Most Serious Problem: *REGULATION OF RETURN PREPARERS: Taxpayers and Tax Administration Remain Vulnerable to Incompetent and Unscrupulous Return Preparers While the IRS Is Enjoined From Continuing its Efforts to Effectively Regulate Unenrolled Preparers*); National Taxpayer Advocate 2009 Annual Report to Congress 41-69; National Taxpayer Advocate 2008 Annual Report to Congress 503-12; National Taxpayer Advocate 2006 Annual Report to Congress 197-221; National Taxpayer Advocate 2005 Annual Report to Congress 223-37; National Taxpayer Advocate 2004 Annual Report to Congress 67-88; National Taxpayer Advocate 2003 Annual Report to Congress 270-301; National Taxpayer Advocate 2002 Annual Report to Congress 216-30; *Fraud in Income Tax Return Preparation: Hearing Before the Subcomm. On Oversight of the H. Comm. on Ways and Means*, 109th Cong. (2005) (statement of Nina E. Olson, National Taxpayer Advocate).

- Assign victims of identity theft a single point of contact;¹² and
- Accelerate the due dates for filing Forms W-2, *Wage and Tax Statement*, W-3, *Transmittal of Wage and Tax Statements*, and 1099 with the IRS and Social Security Administration.¹³

The following sections discuss bills introduced during the 113th Congress that reflect legislative recommendations made by the National Taxpayer Advocate in her Annual Reports to Congress.

Tax Refund Theft Prevention Act of 2014

Senators Hatch and Wyden introduced the Tax Refund Theft Prevention Act of 2014, which would enact a number of the National Taxpayer Advocate's previous recommendations.¹⁴ The legislation would provide taxpayers with access to real-time transcripts of third-party data to aid in return preparation.¹⁵ The legislation would also establish a safe harbor for *de minimis* errors on information returns and payee statements.¹⁶ The legislation contains two proposals regarding electronic filing, including establishing an Internet platform for Form 1099 filings;¹⁷ and requirements that electronically prepared paper returns include scannable code.¹⁸ Finally, the legislation would require the IRS to establish a single point of contact for identity theft victims and to work with the identity theft victim until all related issues are resolved.¹⁹

Real Time Tax System

In our 2012 and 2011 Annual Reports 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.²⁰ On April 15, 2013, Senator Shaheen introduced the Simpler Tax Filing Act of 2013, which would require the Secretary of the Treasury to study the feasibility of providing certain taxpayers with an optional, pre-prepared tax return.²¹

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- 12 S. COMM. ON FIN., *Proposal to Combat Tax Fraud, Make Filing Safer, Simpler and More Efficient*, § 1 (Nov. 20, 2013), available at <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Language.pdf>. See also National Taxpayer Advocate 2013 Annual Report to Congress at 83 (Most Serious Problem: *IDENTITY THEFT: The IRS Should Adopt a New Approach to Identity Theft Victim Assistance that Minimizes Burden and Anxiety for Such Taxpayers*).
- 13 S. COMM. ON FIN., *Proposal to Combat Tax Fraud, Make Filing Safer, Simpler and More Efficient*, § 12 (Nov. 20, 2013), available at <http://www.finance.senate.gov/imo/media/doc/Chairman%27s%20Staff%20Discussion%20Draft%20of%20Tax%20Administration%20Reform%20Language.pdf>. See also National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, § 5, at 86-88 (Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).
- 14 Tax Refund Theft Prevention Act of 2014, S. 2736, 113th Cong. (2014).
- 15 S. 2736, § 12, 113th Cong. (2014). See National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 69, 89, 91, 96 (Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).
- 16 *Id.* However, the proposal is for \$25, rather than \$50.
- 17 S. 2736, § 3, 113th Cong. (2014). National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 75-76 (Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*).
- 18 Tax Refund Theft Prevention Act of 2014, S. 2736, § 4, 113th Cong. (National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 70, 91, 96 (Study: *Fundamental Changes to Return Filing and Processing Will Assist Taxpayers in Return Preparation and Decrease Improper Payments*)).
- 19 S. 2736, § 5, 113th Cong. (2014). National Taxpayer Advocate 2013 Annual Report to Congress at 83 (Most Serious Problem: *IDENTITY THEFT: The IRS Should Adopt a New Approach to Identity Theft Victim Assistance that Minimizes Burden and Anxiety for Such Taxpayers*).
- 20 National Taxpayer Advocate 2012 Annual Report to Congress 180-91 (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 284-95 (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*).
- 21 Simpler Tax Filing Act of 2013, S. 722, 113th Cong. (2013).

The bill also would require the Secretary of the Treasury, in consultation with the Taxpayer Advocate Service (TAS), to report to the House Committee on Ways and Means and the Senate Committee on Finance on actions necessary to achieve the goal of offering pre-prepared tax returns by tax year 2018. The report would be required to include analysis of the budgetary, administrative, and legislative barriers to achieving that goal, including the funding that it would require.²²

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.²³ This “taxpayer receipt” could be a more detailed version of the pie chart currently published by the IRS showing federal income and outlays,²⁴ but would be provided directly to each taxpayer in connection with the filing of a tax return.²⁵ 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.²⁶

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, at times, resources were being shifted to enforcement. Among our proposals was to enact a comprehensive Taxpayer Bill of Rights (TBOR) that would explicitly detail the rights and responsibilities of taxpayers.²⁷ In June 2014, the IRS adopted a TBOR, which set out ten rights and provided taxpayers with clear explanations of their rights.²⁸ However, to cement these fundamental concepts as a permanent part of our tax system, the National Taxpayer Advocate is once again recommending that Congress codify a TBOR. Additionally, because about 16 years have elapsed since Congress last passed major tax procedure legislation, and some statutory protections are outdated or the passage of time has shown that new protections are needed, the National

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

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

24 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 (2014), at 100.

25 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.gov/files/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.

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

27 See Legislative Recommendation: *Codify the Taxpayer Bill of Rights, infra*. See also National Taxpayer Advocate 2013 Annual Report to Congress 5 (Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*); 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.TaxpayerAdvocate.irs.gov/2013AnnualReport; National Taxpayer Advocate 2011 Annual Report to Congress 493-518 (Legislative Recommendation: *Enact the Recommendations of the National Taxpayer Advocate to Protect Taxpayer Rights*); National Taxpayer Advocate 2007 Annual Report to Congress 478-89 (Key Legislative Recommendation: *Taxpayer Bill of Rights and De Minimis “Apology” Payments*).

28 IR-2014-72, IRS Adopts “Taxpayer Bill of Rights;” 10 Provisions to be Highlighted on IRS.gov, in Publication 1 (Jun. 10, 2014).

Taxpayer Advocate encourages Congress to enact the legislative recommendations relating to taxpayer rights detailed in this and previous annual reports. On July 22, 2013, Representative Roskam introduced the Taxpayer Bill of Rights Act of 2013,²⁹ 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.*³⁰ These rights are identical to those proposed in our 2011 report. On July 31, 2013, the bill was approved by the House of Representatives, but the Senate did not act on it.

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.³¹ The proposed legislation would prohibit *ex parte* communications (*i.e.*, those that do not include the taxpayer or the taxpayer's representative) between Appeals officers and other IRS employees.³² In addition, the proposed legislation would extend the period in which a third party can bring suit for return of levied funds or proceeds.³³

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 period of 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;³⁴ and

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

30 *Id.*

31 Small Business Taxpayer Bill of Rights Act of 2013, S. 725, 113th Cong. (2013) and H.R. 3479, 113th Cong. (2013). See also National Taxpayer Advocate 2013 Annual Report to Congress 5-19 (Most Serious Problem: *Taxpayer Rights: The IRS Should Adopt a Taxpayer Bill of Rights as a Framework for Effective Tax Administration*).

32 S. 725, 113th Cong. § 7 (2013) and H.R. 3479, 113th Cong. § 7 (2013). See National Taxpayer Advocate 2009 Annual Report to Congress 346-50 (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).

33 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 202-09 (Legislative Recommendation: *Return of Levy or Sale Proceeds*).

34 S. 725, 113th Cong. § 11 (2013); H.R. 3479, 113th Cong. § 11 (2013). See National Taxpayer Advocate 2004 Annual Report to Congress 490-92 (Legislative Recommendation: *Effect of Automatic Stay Imposed in Bankruptcy Cases upon Innocent Spouse and CDP Petitions in Tax Court*).

- 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*.³⁵

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 in these cases 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 suggests the need for better procedures to protect businesses trying to comply with the payroll tax requirements, particularly for small business taxpayers that hire smaller third party payers. For the past decade, the National Taxpayer Advocate has recommended numerous administrative and legislative actions to assist victims of payroll service provider (PSP) failure.³⁶ More specifically, to protect taxpayers from third party misappropriation of payroll taxes, the National Taxpayer Advocate recommended in her 2012 Annual Report that Congress:

- Amend the Code to require any person who enters into an agreement with an employer to collect, report, and pay any employment taxes to furnish a performance bond that specifically guarantees payment of federal payroll taxes collected, deducted, or withheld by such person from an employer and from wages or compensation paid to employees;
- Amend IRC § 3504 to require agents with an approved Form 2678, *Employer/Payer Appointment of Agent*, to allocate reported and paid employment taxes among their clients using a form prescribed by the IRS and impose a penalty for the failure to file absent reasonable cause; and

35 S. 725, 113th Cong. § 14 (2013); H.R. 3479, 113th Cong. § 14 (2013). See National Taxpayer Advocate 2011 Annual Report to Congress 531-36 (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 to 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 National Taxpayer Advocate 2013 Annual Report to Congress 408-19 (Most Litigated Issue: *Relief from Joint and Several Liability Under IRC § 6015*).

36 See National Taxpayer Advocate 2012 Annual Report to Congress 426-44 (Most Serious Problem: *Early Intervention, Offers in Compromise, and Proactive Outreach Can Help Victims of Failed Payroll Service Providers and Increase Employment Tax Compliance*); National Taxpayer Advocate 2012 Annual Report to Congress 553-59 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); National Taxpayer Advocate 2007 Annual Report to Congress 337-54 (Most Serious Problem: *Third Party Payers*); National Taxpayer Advocate 2007 Annual Report to Congress 538-44 (Legislative Recommendation: *Taxpayer Protection From Third Party Payer Failures*); National Taxpayer Advocate 2004 Annual Report to Congress 394-99 (Legislative Recommendation: *Protection from Payroll Service Provider Misappropriation*).

- Amend the U.S. Bankruptcy Code to clarify that IRC § 6672 penalties survive bankruptcy in the case of non-individual debtors.³⁷

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.³⁸

Consolidated Appropriations Act, 2014 and Consolidated and Further Continuing Appropriations Act, 2015

Congress recently enacted legislation that incorporates two of the National Taxpayer Advocate's past recommendations.³⁹ Both the Consolidated Appropriations Act, 2014 and the Consolidated and Further Continuing Appropriations Act, 2015 require the IRS to:

1. Issue dual address change notices related to an employer making employment tax payments (with one notice sent to both the employer's former and new address); and
2. Give special consideration to an offer in compromise (OIC) request from a victim of fraud or bankruptcy by a third-party payroll tax preparer.⁴⁰

The National Taxpayer Advocate will monitor the process to ensure the IRS is on track to issue the dual notices by the date promised, and has concerns about how the IRS will implement its recently issued guidance on processing OICs submitted by victims of PSPs.⁴¹

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

37 See National Taxpayer Advocate 2012 Annual Report to Congress 553-59 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); National Taxpayer Advocate 2007 Annual Report to Congress 538-44; National Taxpayer Advocate 2004 Annual Report to Congress 394-99. Third party payer recommendations initially had included a provision to clarify that the Trust Fund Recovery Penalty applies to third party payers, which was not included here because the IRS implemented this administratively. See Interim Guidance Memorandum SBSE-05-0711-044, *Interim Guidance for Conducting Trust Fund Recovery Penalty Investigations in Cases Involving a Third-Party Payer* (July 01, 2011) (also incorporated in IRM 5.1.24.5.8 (Aug. 15, 2012)). See also S. 1321, 109th Cong. (2005) (introduced by Senator Santorum), S. 3583, 109th Cong. (2006) (introduced by Senator Snowe), S. 1773, 110th Cong. (2007) (introduced by Senator Snowe), and S. 900, 113th Cong. (2013) (introduced by Senator Mikulski and discussed in more detail below) included parts of third party payer recommendations made by the National Taxpayer Advocate.

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

39 See National Taxpayer Advocate 2012 Annual Report to Congress 426-44 (Most Serious Problem: *Early Intervention, Offers in Compromise, and Proactive Outreach Can Help Victims of Failed Payroll Service Providers and Increase Employment Tax Compliance*).

40 See Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, Division E, Title I, § 106, 128 Stat. 5, 190 (2014) and Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, Division E, Title I, § 106, 128 Stat. 2130, 2338 (2014).

41 For a detailed discussion, see Most Serious Problem: *OFFERS IN COMPROMISE: The IRS Does Not Comply with the Law Regarding Victims of Payroll Service Provider Failure*, *supra*.

file (DMF).⁴² The fiscal year 2014 budget bill, which was signed into law on December 26, 2013, contained a provision that restricts access to the DMF records of individuals who died during the previous three calendar years.⁴³

Consolidate Education Incentives

The National Taxpayer Advocate has suggested consolidating and simplifying various Code provisions to make compliance less difficult.⁴⁴ 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.⁴⁵ 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.

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."⁴⁶ 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 July 9, 2014, Senator Tim Johnson introduced the Tribal Adoption Parity Act, which would allow tribal governments to make the determination that a child is a child with special needs for purposes of the adoption tax credit.⁴⁷ On the House side, Representative Kilmer introduced the Adoption Tax Credit Parity Act of 2013 on June 12, 2013.⁴⁸

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 on occasion recommends that Congress take action. In some cases, the IRS has reconsidered its position and addressed issues raised in the National Taxpayer Advocate legislative recommendations through the issuance of guidance, as described below.

42 See National Taxpayer Advocate 2011 Annual Report to Congress 519-23 (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.

43 Bipartisan Budget Act of 2013, Pub. L. No. 113-67, § 203, 127 Stat. 1165, 1177-79 (2013).

44 See, e.g., National Taxpayer Advocate 2008 Annual Report to Congress 370-72 (Legislative Recommendation: *Simplify and Streamline Education Tax Incentives*).

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

46 National Taxpayer Advocate 2012 Annual Report to Congress 521-25 (Legislative Recommendation: *Amend the Adoption Credit to Acknowledge Jurisdiction of Native American Tribes*).

47 Tribal Adoption Parity Act, S. 2570, 113th Cong. (2014).

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

Removal of the 36-Month Non-Payment Testing Period Rule for Cancellation of Debt Reporting

The 36-month “testing period” rule created by regulations issued pursuant to IRC § 6050P creates a presumption that a creditor is required to issue a Form 1099-C, *Cancellation of Debt*, even if the creditor is not actually discharging the debt.⁴⁹ This enables a creditor to continue to try to collect a debt while the IRS proposes additional tax due to the reported cancellation of the same debt.⁵⁰ This rule divorces the creditor’s reporting obligation from the question whether a debt has actually been discharged.⁵¹ Because this requirement was regulatory and not statutorily required, the National Taxpayer Advocate originally sought to have the IRS amend its regulations, but when it appeared the IRS did not intend to act, she recommended that Congress amend IRC § 6050P to effectively overturn the 36-month regulatory “testing period” as a basis on which to issue a Form 1099-C.⁵²

In October 2014, the IRS published a Notice of Proposed Rulemaking regarding the “Removal of the 36-Month Non-Payment Testing Period Rule.”⁵³ The notice said the Department of the Treasury and the IRS believe that information reporting under IRC § 6050P should coincide with the actual discharge of debt rather than non-payment for 36 months, and that removal of this rule will reduce confusion for taxpayers and increase compliance.⁵⁴

49 National Taxpayer Advocate 2010 Annual Report to Congress 383-86 (Legislative Recommendation: *Remove the 36-Month “Testing Period” that May Trigger Cancellation of Debt Reporting*). See IRC §§ 61(a)(12) (providing that a taxpayer’s gross income includes income from the discharge of indebtedness) and 6050P; Treas. Reg. § 1.6050P-1(a) (requiring creditors that discharge an indebtedness of at least \$600 during any calendar year to file a Form 1099-C information return with the IRS).

50 Under the 36-month non-payment testing period rule, a discharge of indebtedness is “deemed” to have occurred if (and only if) an identifiable event has occurred, “whether or not an actual discharge of indebtedness has occurred.” See Treas. Reg. § 1.6050P-1(a) (There is an exception, under Treas. Reg. § 1.6050P-1(b)(3), that a creditor may, at its discretion, report an actual discharge of indebtedness that occurs before an identifiable event occurs. The continued collection activity is relevant only where the creditor wishes to rebut a presumption that a debt has been canceled. The creditor may rebut the presumption if the creditor engaged in a significant bona fide collection activity at any time within the 12-month period ending at the close of the calendar year if the facts and circumstances existing as of January 31 of the calendar year following the expiration of the non-payment testing period indicate that the indebtedness has not yet been discharged).

51 See National Taxpayer Advocate 2010 Annual Report to Congress at 385 (Legislative Recommendation: *Remove the 36-Month “Testing Period” that May Trigger Cancellation of Debt Reporting*).

52 *Id.* at 383.

53 Removal of the 36-Month Non-Payment Testing Period Rule, 79 Fed. Reg. 61791 (Oct. 15, 2014). The comment period is open until January 13, 2015.

54 *Id.*