

## MSP #12 **THIRD PARTY CONTACTS: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations**

### RESPONSIBLE OFFICIALS

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### TAXPAYER RIGHTS IMPACTED<sup>1</sup>

- *The Right to Be Informed*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Privacy*
- *The Right to Confidentiality*
- *The Right to a Fair and Just Tax System*

### DEFINITION OF PROBLEM

The IRS is generally required by Internal Revenue Code (IRC) § 7602(c) to give taxpayers reasonable advanced notice before making third party contacts (TPC) and to provide them with post-contact reports both periodically and upon request. Advance notice should allow taxpayers an opportunity to volunteer information that would, in many cases, make TPCs unnecessary, avoiding potential damage to the taxpayer's business and reputation.<sup>2</sup> The IRS often satisfies this requirement by including Publication 1, *Your Rights as a Taxpayer* (Pub 1), or a similarly general notice with its initial contact letter. These notices are ineffective because they do not identify the information the IRS needs, inform the taxpayer the IRS will make a TPC in the taxpayer's particular case, or provide the taxpayer with enough advanced notice to deliver the information before the contact.<sup>3</sup> TAS found that in cases where the IRS made TPCs, IRS employees did not first ask taxpayers for the specific information at issue in 22.8 percent of field exam cases and 11.1 percent of field collection cases.<sup>4</sup>

In addition, timely post-contact reports—*i.e.*, reports provided to taxpayers informing them of which TPCs were actually made—could help taxpayers mitigate damage caused by TPCs. However, they are also ineffective because the IRS does not provide them automatically (on a periodic basis), as required by

1 See Taxpayer Bill of Rights, available at [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights).

2 See, e.g., S. REP. No. 105-174 at 77 (1998).

3 The IRS may proceed with a TPC just ten days after sending the TPC notice or immediately after confirming its receipt. IRM 4.11.57.4.1.1.1, *Providing Notification Using Publication 1* (Dec. 20, 2011); IRM 25.27.1.3.1, *TPC Notification Procedures* (Jan. 16, 2014).

4 Unless otherwise indicated, the data in this discussion are drawn from a stratified random sample of 423 field collection and 485 field examination cases closed in fiscal year (FY 2013) that TAS reviewed in 2015 (collectively, the "TPC Sample (2015)"). TAS reviewers could not determine if the IRS employee had first asked the taxpayer for this information in another 22.2 percent of the field exam cases and 14.0 percent of the field collection cases. TPC Sample (2015) (Q6). For a description of the sampling methodology and tables that show the extent to which the results can be projected to the population at a 95 percent level of confidence (*i.e.*, standard errors and confidence intervals), see the appendix. For example, although we estimate that Revenue Agents (RAs) did not ask the taxpayer for specific information before asking a third party 22.8 percent of the time, the size of our sample only allows us to be 95 percent confident that the true figure is between 10.8 and 41.7 percent for the population as a whole, as shown in the appendix.

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IRC § 7602(c)(3), and taxpayers have no reason to request them unless they know the IRS has made a TPC. Moreover, TPC notices generally do not inform taxpayers of how to request a report.<sup>5</sup> Perhaps for these reasons, taxpayers did not request TPC reports in any of the 908 cases that TAS reviewed.<sup>6</sup> Even if a taxpayer requests one, the IRS does not have sufficient controls in place to ensure exceptions to the TPC reporting requirements are applied correctly or that the reports are complete. TAS found the IRS's TPC database, which it uses to generate these reports, was incomplete in 42.1 percent of field examination cases and in 48.5 percent of field collection cases.<sup>7</sup> Moreover, the IRS's case quality reviews do not effectively detect these discrepancies.

Addressing these problems would help minimize unnecessary damage to the taxpayer's reputation and business and further the taxpayer's *rights to be informed, to a fair and just tax system, to privacy, to confidentiality, and to challenge the IRS's position and be heard.*<sup>8</sup> Thus, the IRS's current TPC procedures dilute five of the ten taxpayer rights adopted by the IRS.

## ANALYSIS OF PROBLEM

### When the IRS Contacts Third Parties, It Discloses Confidential Taxpayer Information Otherwise Protected Under IRC § 6103

In general, IRC § 6103 prevents IRS employees from disclosing confidential taxpayer information. If they unnecessarily disclose taxpayer information, the taxpayer may sue the IRS for damages.<sup>9</sup> However, IRS employees may disclose confidential return information to the extent necessary to conduct their official duties.<sup>10</sup> For example, IRS employees may need to disclose to a taxpayer's customers, employees, or colleagues that he or she is under investigation by the IRS to obtain information in connection with an examination or investigation. Some customers may decide to use other suppliers in light of the implication that the IRS suspects the taxpayer is a tax cheat or has unpaid tax liabilities. TAS's study found the IRS made TPCs in 68.1 percent of its field collection cases and 8.5 percent of its field examination cases.<sup>11</sup> Although in some instances damage to the taxpayer's reputation and business may be unavoidable, IRC § 7602(c) provides some procedural protection.

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5 IRS training materials for TPC coordinators indicate that if a taxpayer requests a list from an IRS employee, the employee should forward the request to the TPC coordinator. IRS response to TAS information request (June 29, 2015).

6 TAS Sample (2015) (Q1 and Q11). Specifically, 284 of the 908 cases TAS reviewed had a non-exempt TPC and no one requested a TPC report.

7 TAS Sample (2015) (Q9). Please see the appendix for confidence intervals.

8 IRS Pub 1, *Your Rights as a Taxpayer* (Dec. 2014).

9 IRC § 7431; IRM 11.3.1.6.4, *Civil Liberty Under IRC § 7431* (May 24, 2005).

10 See, e.g., IRC § 6103(k)(6); Treas. Reg. § 301.6103(k)(6)-1; IRM 4.2.5.3, *Investigative Disclosures* (July 29, 2011).

11 TPC Sample (2015) (Q1). Please see the appendix for confidence intervals.

### IRC § 7602(c) Requires the IRS to Notify Taxpayers Before Making TPCs and to Provide Them With Reports of TPCs

Enacted as part of the Internal Revenue Restructuring and Reform Act of 1998 (RRA 98), IRC § 7602(c) (1) provides that:

An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing *reasonable notice in advance* to the taxpayer that contacts with persons other than the taxpayer may be made. (Emphasis added).<sup>12</sup>

In addition to the advance TPC notice requirement, IRC § 7602(c)(2) requires the IRS to provide the taxpayer with a record of TPCs both “periodically” and upon request. If taxpayers know which third parties the IRS contacted, they may be able to mitigate the resulting damage.

### The Advanced TPC Notice Requirement Is Supposed to Give Taxpayers an Opportunity to Volunteer Information

In describing the reasons for IRC § 7602(c), the Senate Committee on Finance report explains:

[T]axpayers should be notified before the IRS contacts third parties regarding examination or collection activities with respect to the taxpayer. Such contacts may have a chilling effect on the taxpayer’s business and could damage the taxpayer’s reputation in the community. Accordingly, the Committee believes that taxpayers should have the *opportunity to resolve issues and volunteer information before the IRS contacts third parties*.<sup>13</sup>

The preamble to the Treasury Regulations reiterates that the TPC procedures:

*[E]nable a taxpayer to come forward with information required by the IRS before third parties are contacted. The taxpayer’s business and reputational interests therefore can be addressed without impeding the IRS’ ability to make those third-party contacts that are necessary...*<sup>14</sup>

Similarly, the current Internal Revenue Manual (IRM) acknowledges:

[T]he intent behind this statute is to prevent the Service from disclosing to third parties that the taxpayer is the subject of a Service action without first providing reasonable notice to the

12 Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3417, 112 Stat. 685, 757 (1998). The language of IRC § 7602(c)(1) differs from the bill that passed in the Senate, which would have required the IRS to identify specific third parties. H.R. 2676, § 3417, 105th Cong. 2d Sess. (May 7, 1998) (requiring the IRS to provide the taxpayer with “reasonable notice” of “such contact”). See also, Third Party Contacts, NPRM, 66 Fed. Reg. 77 (Jan 2, 2001) (“As originally drafted by the Senate Finance Committee, the third-party contact rule would have prohibited most IRS contacts with third parties prior to taxpayer notification of the specific contact to be made... The requirement for specific pre-contact notice was modified by the Conference Committee to require only a generalized notice of IRS intent to contact third parties...”). If this change was based on a concern that if the taxpayer knew who the IRS would contact he or she might try to influence a third party’s testimony, it would still be reasonable to expect the IRS to give the taxpayer advanced notice of the specific information it would seek from third parties if not provided by the taxpayer.

13 S. REP. No. 105-174 at 77 (1998) (emphasis added). The Conference Report explains the IRS will provide “reasonable notice in advance to the taxpayer that the IRS may contact persons other than the taxpayer,” and contemplates that it will “be provided as part of an existing IRS notice.” Conf. Rept. 105-599 at 277 (1998). Thus, the IRS could include a specific TPC notice in an existing notice or letter, such as an information document request (IDR) or in correspondence confirming its receipt or non-receipt of the taxpayer’s response to an IDR. The IRS could revert to its practice of using IRS Letter 3164-G (DO), (*Exam-3*) *Third Party Contact Letter*, for this purpose.

14 T.D. 9028, 67 Fed. Reg. 77,419, 77,420 (Dec. 18, 2002) (emphasis added). See also Chief Counsel Advice (CCA) 200109047 (2001) (“[T]he congressional intent behind these requirements is to provide taxpayers with the opportunity to come forward with information before third parties are contacted and the means to address any reputational concerns arising from such contacts...”).

taxpayer and allowing the taxpayer an opportunity to provide the information and resolve the matter.<sup>15</sup>

When the TPC is to verify information already provided by the taxpayer, a reasonable notice can be less specific because the taxpayer is unlikely to avoid it by providing the verification.<sup>16</sup> When the TPC is to obtain information, however, reasonable advanced notice may require the IRS to identify the specific information it needs so the taxpayer can avoid the contact by either providing the information or resolving the matter. Indeed, practitioners, including representatives of the State Bar of California Tax Section, have complained that the IRS's current TPC notice process does not give taxpayers a realistic opportunity to provide the information (or to resolve the matter) and avoid TPCs.<sup>17</sup>

### TPC Notices Can Be So Vague That the Taxpayer Has No Opportunity to Provide the Information

The IRM explains that “[G]enerally, contacts with third parties are made when the examiner is unable to obtain the information from the taxpayer or when it is necessary for the examiner to verify the information provided by the taxpayer.”<sup>18</sup> However, it does not actually require the employee to first request the information from the taxpayer or even disclose what information the examiner plans to seek from third parties.

The IRS uses Pub 1 and various other documents to satisfy the TPC notice requirement.<sup>19</sup> They generally include language such as the following:

Generally, the IRS will deal directly with you or your duly authorized representative. However, we sometimes talk with other persons if we need information that you have been unable to provide, or to verify information we have received. If we do contact other persons, such as a neighbor, bank, employer, or employees, we will generally need to tell them limited information, such as your name. The law prohibits us from disclosing any more information than is necessary to obtain or verify the information we are seeking. Our need to contact other persons may continue as long as there is activity in your case. If we do contact other persons, you have a right to request a list of those contacted.<sup>20</sup>

15 IRM 4.11.57.2(3) (Jan. 17, 2014) (emphasis added). See also IRM 4.10.3.2.1.4, *Third Party Interviews* (Mar. 1, 2003).

16 See, e.g., Treas. Reg. § 301.6103(k)(6)-1(d) (Ex. 1) (“In contacting the suppliers, the revenue agent discloses the taxpayer’s name, the dates of purchase, and the type of merchandise at issue. These disclosures are permissible under section 6103(k)(6) because, under the facts and circumstances known to the revenue agent at the time of the disclosures, the disclosures were necessary to obtain information (corroboration of invoices) not otherwise reasonably available because suppliers would be the only source available for corroboration of this information.”). An IRS CCA has approved the practice of sending general notices to verify wage information—a context in which less specific notice may, in fact, be reasonable. CCA 200814008 (Apr. 4, 2008).

17 See, e.g., Kevan P. McLaughlin, State Bar of California Tax Section, *Balancing Privacy and Efficiency Under Section 7602: What Is “Reasonable Notice” and Changing IRS Procedures Related to Third Party Contacts* (2012); Systemic Advocacy Management System (SAMS), Submission 26446 (Feb. 5, 2013).

18 IRM 4.11.57.4(1) (Dec. 20, 2011) (emphasis added). See also IRM 4.32.2.7.3.2(3) (2012) (“Examiners should attempt to obtain the information in writing from the promoter before contacting any third parties.”); IRM 25.27.1.3, *Notification Requirements* (Jan. 16, 2014) (“It is the Service’s practice to obtain information relating to a liability or collectability determination directly from the taxpayer whenever possible.”); IRM 4.10.3.2.1.4(2) (Mar. 1, 2003) (“Information will be collected, to the greatest extent practicable, directly from the taxpayer to whom it relates... Information about taxpayers collected from third parties will be verified to the extent practicable with the taxpayer before action is taken.”).

19 See, e.g., IRM 25.27.1.3.1(1) (Jan. 16, 2014). For example, Letters 3164, 3230, 3232, 3234, 3236, 3238, 3345, 3404, 4464, and Notice 1219 all contain TPC language.

20 IRS Pub 1, *Your Rights as a Taxpayer*.

This language is vague. It does not even reveal whether the IRS plans to make a TPC in the taxpayer's particular case. Moreover, the IRS generally delivers the TPC notice with the initial contact letter—potentially before the IRS has requested any information from the taxpayer.<sup>21</sup> Finally, this language fails to disclose that the IRS is required to provide the taxpayer with periodic reports of the TPCs it makes. Instead, the IRS ignores the law and places the burden on the taxpayer to request such reports (as discussed below).

### The IRS No Longer Provides a Second, More Specific TPC Notice

The IRS used to provide more specific TPC notices. In testimony before the Senate Finance Committee on February 2, 2000, Commissioner Rossotti explained that:

When we first implemented this provision [TPC notices], we attempted a “one size fits all” approach by sending a broadly written notice to virtually every taxpayer in our administrative stream... The reaction was immediate, strong, and negative. We were told that the generic nature of the notice did not provide its recipients with any indication of why we would contact third parties to talk about their tax situations or what information we would seek.<sup>22</sup>

Accordingly, under IRS procedures in effect between 2000 and 2005, the IRS issued a general TPC notice followed by a more detailed one.<sup>23</sup> The second notice was more likely to alert the taxpayer that the IRS was actually planning to make TPCs unless it received additional information from the taxpayer. These notices included a specific IRS employee's contact information and sometimes even identified the specific information that the IRS needed or needed to verify and why. For example, Letter 3164-G (DO), (*Exam-3*) *Third Party Contact Letter*, specifies the information the IRS needs and the date it was requested from the taxpayer. Similarly, Letter 3164-F (DO), (*Exam-2*) *Third Party Contact Letter*, identifies the specific information the IRS needs to verify.<sup>24</sup>

21 IRM 4.10.2.7.4.2, *Contacting the Taxpayer by Letter* (Apr. 2, 2010) (requiring Pub 1 to be included with the initial contact letter).

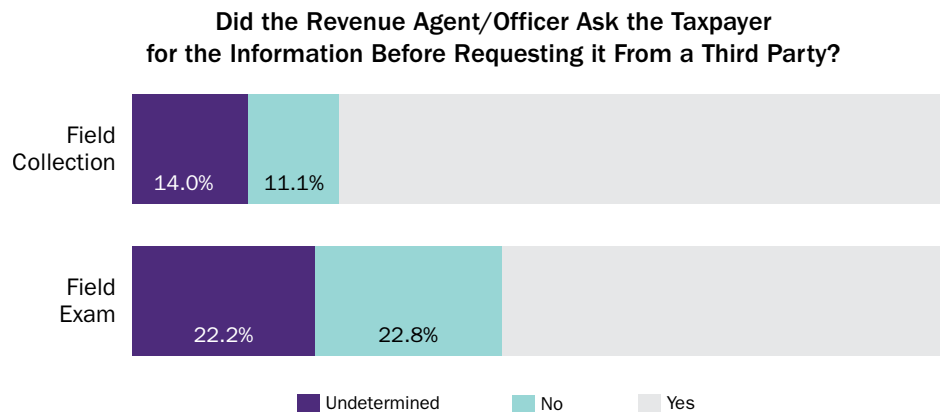
22 *Hearing Before the S. Finance Comm. on Status of IRS Reform*, 106th Cong. 2nd Sess. 46 (2000) (testimony of IRS Commissioner Rossotti).

23 The IRS previously sent Notice 1219, which included language similar to Pub 1, and then followed up with one of the more specific versions of Letter 3164. See, e.g., IRM 4.10.1.6.12.2.1(5), *Notification Procedures* (May 14, 1999) (“CAUTION: Providing the taxpayer with Notice 1219 alone does not constitute adequate notification of third party contacts. It must be attached to another letter that contains the required information found in Letter 3164: date, taxpayer's name, address and TIN, employee's name, telephone number, identification (badge) number and officer hours, tax form, type of tax and tax period(s).”). The 1999 version of IRM 4.10.1.6.12.2.1, which described this two-notice process, remains a part of the current IRM, but it conflicts with more current guidance, which states that a second more-specific TPC notice is not required. See, e.g., IRM 4.11.57.4.1.1.1, *Procedures for Providing Advance General Notice That Third Parties May Be Contacted* (Dec. 20, 2011); IRM 25.27.1.3.1, *TPC Notification Procedures* (Jan. 1, 2014); IRM 4.8.8.18.1(2) (July 1, 2011). *Accord*, T.D. 9028, 67 Fed. Reg. 77,419, 77,420 (Dec. 18, 2002) (describing “general pre-contact notice followed by post-contact identification...”).

24 Letter 3404C, *AUR Third Party Contact*, even identifies the third parties to be contacted. By contrast, Letter 3164-N, *Third Party Contact to Preparers*, and Letter 3164-P, *Third Party Notification for IRC 6700/6701 Investigations*, provide more generic statements such as the one quoted above.

However, the IRS has reverted to its prior practice of providing a single generic notice. According to the current IRM, Letters 3164-G and 3164-F “are no longer applicable because notice is given via Pub 1.”<sup>25</sup> This guidance may suggest that those who take the trouble to identify and request the specific information from the taxpayer before making a TPC to obtain it are going beyond what is required. TAS found that in 22.8 percent of field exam cases and 11.1 percent of field collection cases IRS employees did not ask taxpayers for such specific information before making TPCs to obtain it.

**FIGURE 1.12.1**<sup>26</sup>



### The IRS Does Not Provide TPC Notice Far Enough in Advance to Allow the Taxpayer to Provide the Information

Even if the IRS were to give taxpayers meaningful advance TPC notice (*e.g.*, by using Letter 3164-G or something similar), IRS employees can make TPCs just ten business days after sending it or immediately after they deliver it by hand or otherwise confirm its receipt.<sup>27</sup> TAS’s review found that IRS employees did not even wait this long in 5.3 percent of the field collection cases and in 2.3 percent of the field exam cases.<sup>28</sup> Similarly, an IRS review of 39 field examination cases closed without agreement in

25 IRM 4.11.57.4.1.1, *Procedures for Providing Advance General Notice That Third Parties May Be Contacted* (Dec. 20, 2011). See also, IRM 25.27.1.3.1, *TPC Notification Procedures* (Jan. 1, 2014) (“If the appropriate Letter 3164 or Publication 1 (Pub 1), *Your Rights as a Taxpayer*, version dated 09/2012 has been sent and the requisite waiting period has lapsed, the employee may seek additional information.” (Emphasis added)); IRM 4.8.8.18.1(2) (July 1, 2011) (explaining, “[P]reviously, the advance general notice of potential third-party contact was usually accomplished by issuance of one of several versions of Letter 3164, *Third Party Notice*. In May 2005, Pub 1, *Your Rights as a Taxpayer*, was revised to include the advance general notice of potential third-party contact that is required by IRC § 7602. This revision is consistent with the amendment of IRC § 7602, as the Conference Committee Report (H.R. Conf. Rep. 105-599) for that section specifies, “[I]t is intended that in general this notice will be provided as part of an existing IRS notice provided to taxpayers.”). Accord IRM 5.1.1.10.1, *TPC Advance Notification Procedures* (May 15, 2014) (“Letter(s) 3164 B or C (DO) are not required prior to making a third party contact as long as the revenue officer can verify through ICS that the taxpayer has received a Pub 1 (Rev. 05/2005) and/or Notice CP-504 or Notice CP-518.”).

26 TPC Sample (2015) (Q6). Although we estimate that RAs and ROs did not ask the taxpayer for specific information before asking a third party 22.8 and 11.1 percent of the time (respectively), the size of our sample only allows us to be 95 percent confident that the true figure is within the range of 10.8 to 41.7 percent for RAs and 7.8 to 15.6 percent for ROs, as shown in the appendix.

27 IRM 4.11.57.4.1.1.1, *Providing Notification Using Publication 1* (Dec. 20, 2011); IRM 25.27.1.3.1, *TPC Notification Procedures* (Jan. 16, 2014).

28 TPC Sample (2015) (Q5).

fiscal year (FY) 2014 found that in 13 percent, the examiner did not provide the taxpayer with appropriate advanced notice of the TPC.<sup>29</sup>

In addition, practitioners have complained that a TPC notice delivered immediately before the contact leaves the taxpayer with no opportunity to provide information to the IRS.<sup>30</sup> Even ten days is not likely to give the taxpayer enough time to obtain information (potentially from third parties) and deliver it to the IRS, assuming the notice is specific enough that the taxpayer knows what information the IRS needs.

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**The IRS could potentially reduce internal paperwork while increasing the transparency of its third party contacts by providing the taxpayer with a copy of any written request for information from (or an interview with) a third party, instead of sending Form 12175 to the third party contact coordinator.**

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### The IRS Provides a Specific and Timely Notice When It Issues a Third-Party Summons

In contrast to other TPCs, when the IRS issues a third-party summons, it is generally required to give the taxpayer a copy of the summons that identifies a specific third party, the information being summoned, and a discussion of the taxpayer's right to bring an action to quash the summons.<sup>31</sup> Such specific information is necessary to empower the taxpayer to provide the information or initiate proceedings to quash the summons before it is executed.

The IRS generally must provide the taxpayer with a copy of the summons within three days of issuing it and no later than 23 days before the third party is required to respond.<sup>32</sup> A taxpayer would probably need at least as much time to gather information (potentially from a third party) and transmit it to the IRS, as contemplated by the TPC notice requirement. Thus, unlike the TPC notice, the third-party summons notice identifies the information the IRS needs, who the IRS believes may have it, and is delivered to the taxpayer far enough in advance that the taxpayer has an opportunity to obtain and deliver the information to the IRS (making summons enforcement unnecessary) or take action to quash it.

### Increased Transparency Could Reduce the Resources Needed to Track and Report TPCs

To comply with the requirement to provide taxpayers with a record of TPCs, IRS employees record them on Form 12175 (in addition to their normal case activity record) and send it to a TPC coordinator, so that the coordinator can track and report TPCs to the taxpayer upon request.<sup>33</sup> This paperwork is not required with respect to TPCs already provided to the taxpayer.<sup>34</sup> For example, if the IRS gives the taxpayer a copy of a third-party summons, the taxpayer already has a record of the TPC. For this reason, IRS employees do not need to track third-party summons, provide them to the TPC coordinator, or include them in TPC reports provided to the taxpayer.<sup>35</sup> Thus, the IRS could potentially reduce internal paper-

29 SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes 4-5* (Oct. 30, 2015). This was a review of cases involving non-filers, return preparers, or information reports that were closed unagreed in FY 2014 with TPCs that were documented by examiners on contact sheets. *Id.* Unlike the cases TAS reviewed, SB/SE's cases were not selected using a random sampling methodology. *Id.* Examiners are not required to ask the taxpayer for the information before asking a third party, and SB/SE's review did not consider whether examiners had done so.

30 See, e.g., Kevan P. McLaughlin, State Bar of California Tax Section, *Balancing Privacy and Efficiency Under Section 7602: What Is "Reasonable Notice" and Changing IRS Procedures Related to Third Party Contacts* (2012).

31 IRC § 7609(a).

32 *Id.*

33 IRM 25.27.1.4, *Recording and Reporting TPCs* (Jan. 16, 2014).

34 Treas. Reg. § 301.7602-2(e)(3).

35 Treas. Reg. § 301.7602-2(e)(4) (Example 4); IRM 4.11.57.5.1, *Documentation of Contact Not Required* (Jan. 17, 2014).

work while increasing the transparency of its TPCs by providing the taxpayer with a copy of any written request for information from (or an interview with) a third party, instead of sending Form 12175 to the TPC coordinator.

### The IRS Is Violating the Law by Failing to Provide Taxpayers With Periodic Reports

The IRS only provides post-contact reports to taxpayers upon request. It does not provide them to taxpayers “periodically,” as required by IRC § 7602(c)(3).<sup>36</sup> The IRS’s failure to provide “periodic” TPC reports violates IRC § 7602(c)(3). Although the IRS proposed regulations that would have implemented periodic reporting, the final regulations omit these provisions, explaining that the IRS and Treasury “determined that the issuance of periodic reports may result in harm to third parties and, accordingly, has determined that periodic reports should not be issued.”<sup>37</sup> It does not indicate that TPC reports are optional under the law.

The IRS may take the position it is not violating the law because the regulation implicitly presents a re-interpretation of the statutory requirement, but the language in the preamble seems more properly described as an explanation for why the IRS has decided to violate the law. A regulatory preamble does not carry the same force as a regulation. Moreover, even a regulation that had been subject to notice and comment (and the preamble to the final regulations was not) could not overturn such a clear statutory mandate under *Chevron* step-one.<sup>38</sup>

In addition, the reason given by the preamble (*i.e.*, “harm to third parties”) does not make sense. The regulations already protect third parties by providing that the IRS will withhold the identity of those who may be subject to reprisal.<sup>39</sup> It would be illogical to withhold TPC reports from taxpayers to protect third parties whose identities would not be disclosed on those reports.<sup>40</sup> Further, if the government were concerned about harm to the third parties, it is unclear why it would nonetheless provide *ad hoc* reports upon request that would reveal their identities. Although the IRS may now speculate that it was concerned that third parties who do not express any fear of reprisal could, in fact, be harmed if periodic reports were delivered, it did not express this concern in the preamble to the regulations (and there does not appear to be any evidence to support it) or present any other evidence for its disregard of a statutory taxpayer protection.

36 IRM 4.10.1.6.12.3, *Providing Taxpayers With Notice of Third Party Contacts* (May 14, 1999) states that the IRS will provide the taxpayer with a list of TPCs once per year, but it became obsolete once the IRS issued Treasury Regulations in 2002. T.D. 9028, 67 Fed. Reg. 77,419, 77,420 (Dec. 18, 2002). See also IRM 4.11.57.4.6, *Provide a List to the Taxpayer* (Dec. 20, 2011). A seemingly obsolete IRS training document directs employees to inform third parties their name will appear on a list of contacts that will be sent to the taxpayer “once a year” unless the third party indicates that including his or her name may result in reprisal. IRS response to TAS information request (June 29, 2015). TAS has also confirmed with TPC coordinators that they do not send periodic reports.

37 *Compare Third Party Contacts*, NPRM, 66 Fed. Reg. 77-84 (Jan 2, 2001) (proposed regulations), with T.D. 9028, 67 Fed. Reg. 77,419, 77,420-25 (Dec. 18, 2002) (final regulations). Contemporaneous news reports of an employee in Wakefield, Massachusetts who killed seven co-workers after learning about a pending wage levy could have colored the IRS’s thinking about the periodic reporting requirement. See Carey Goldberg, *7 Die in Rampage at Company; Co-Worker of Victims Arrested*, N.Y. Times (Dec. 27, 2000), available at <http://www.nytimes.com/2000/12/27/us/7-die-in-rampage-at-company-co-worker-of-victims-arrested.html>. However, this particular shooting occurred before the IRS issued the proposed regulations that would have provided periodic reports. Moreover, the IRS could not have concealed a wage levy from the shooter in any event.

38 *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). A court only gives deference to agency regulations under *Chevron* step-two, if it first determines the statute is ambiguous under *Chevron* step-one. *Id.*

39 Treas. Reg. § 301.7602-2(f)(3).

40 However, SB/SE found that field examiners did not document consideration of reprisal in any of the TPC cases it reviewed. SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes 1* (Oct. 30, 2015). SB/SE suggested this may result, in part, because 70 percent of the TPCs in the cases it reviewed were conducted using Letter 1995, which was last revised in 1985, before IRC § 7602(c) was enacted, and does not include any language concerning reprisal. *Id.* at 6.



Further, there is a difference between requiring the IRS to provide periodic TPC reports and merely making them available upon request. Many taxpayers who would want to know who the IRS contacted will not know that any contacts were made. Providing TPC reports only upon request also burdens taxpayers to take action where otherwise they would be informed of TPCs automatically. Inasmuch as Congress enacted the periodic reporting requirement to empower taxpayers to repair their reputations, and to ensure that taxpayers know what the IRS is doing, the IRS's nullification of the periodic reporting requirement frustrates that purpose.

Finally, to the extent the IRS gives the impression it is ignoring the law, it may encourage taxpayers to ignore tax laws. It will also seem hypocritical when the IRS enforces them.

### The IRS Should Do More to Empower Taxpayers to Receive TPC Reports

Because the IRS does not send periodic TPC reports, it is even more important for it to empower taxpayers to request TPC reports so that they can mitigate damage from the TPCs. However, the IRS no longer informs taxpayers when it makes a TPC, nor does it explain how to request a list of TPCs.<sup>41</sup> Perhaps for these reasons, taxpayers did not request TPC reports in any of the 908 cases that TAS reviewed.<sup>42</sup> Thus, the IRS should do more to alert taxpayers when TPCs have been made and explain how they can request TPC reports.

### There Are No Effective Remedies for Taxpayers Harmed by the IRS's Violation of the TPC Notice and Reporting Requirements

If IRS employees violate the TPC notice requirements or erroneously omit TPCs from the list provided to the taxpayer, taxpayers have little recourse. In theory, a taxpayer may seek to quash a third-party summons on the basis that the IRS failed to follow IRC § 7602(c), but those who receive Pub 1 before the IRS issues a summons are unlikely to prevail.<sup>43</sup> Moreover, if a third party provides information voluntarily, the IRS would have no reason to issue a summons. In limited circumstances, a taxpayer may also seek to recover actual civil damages resulting from an IRS employee's failure to follow procedures in connection with a third party contact.<sup>44</sup> However, Chief Counsel Advice (CCA) suggests the IRS has never been sued on this basis because it is difficult for taxpayers to show actual damages.<sup>45</sup> Without judicial remedies for the violations of the important taxpayer protections afforded by IRC § 7602(c), taxpayers depend on the IRS's internal controls to ensure employees comply with the law.

41 For example, neither Pub 1 nor Letter 3164-N, *Third Party Contact to Preparers*, explain who a taxpayer should call or write to in making the request and whether any particular form is required.

42 TPC Sample (2015) (Q1 and Q11). Specifically, 284 of the 908 cases TAS reviewed had a non-exempt TPC and no one requested a TPC report.

43 See, e.g., *U.S. v. Jillson*, 84 A.F.T.R.2d 99–7115 (S.D.Fla., 1999) (unreported) (quashing summons issued before TPC notice); *Gangi v. U.S.*, 107 A.F.T.R.2d 2011-1542 (D.N.J. 2011) (unreported), *aff'd* 453 Fed. App'x. 255 (3rd Cir. 2011) (same). *But see*, e.g., *Thompson v. U.S.*, 102 A.F.T.R.2d 2008-6130 (S.D. Tex. 2008) (unreported) (refusing to quash a summons issued after TPC notice included in Pub 1); *Gangi v. U.S.*, 2 F.Supp.3d 12 (D. Mass. 2014) (same).

44 See, e.g., IRC §§ 7433 (damages for unauthorized collection actions by the IRS); 7433A (damages for unauthorized collection actions by contractors). Taxpayers can also sue for damages if an IRS employee unnecessarily discloses taxpayer information protected by IRC § 6103. IRC § 7431; IRM 11.3.1.6.4, *Civil Liberty Under IRC § 7431* (May 24, 2005).

45 See, e.g., CCA 2013071915074952 (2013) ("There is no independent cause of action for violating third-party contact rules. As far as we are aware, the IRS has never been sued for violating the third-party contact rules, though taxpayers have occasionally attempted to assert these types of violations as a defense to summons enforcement or collection actions. In theory, a violation of section 7602(c) might support a suit by a taxpayer against the IRS under section 7433. However, section 7433 only allows a taxpayer to recover actual, direct economic damages and court costs. It is unclear what actual, direct economic damage a taxpayer would suffer as a result of a violation of section 7602(c).").

## Without Sufficient Oversight, Employees Could Fail to Record TPCs on the Database or Apply the “Reprisal” Exception Excessively

### *Low-Graded IRS Employees Are Authorized to Make Reprisal Determinations Without Oversight*

There are several exceptions to the TPC notice and reporting requirements, including situations where an IRS employee has “good cause to believe” that disclosure of the contact “may cause any person to harm any other person in any way” (*i.e.*, a risk of reprisal).<sup>46</sup> The IRS has delegated the authority to make such determinations to low-graded (GS-4 and GS-5) employees.<sup>47</sup> Employees are not required to investigate a third party’s reprisal claim, but they should be required to document some valid basis for the determination (*e.g.*, that a third party expressed a fear of reprisal rather than simply a preference not to be named).<sup>48</sup> One commentator argued that because “good cause” is a low standard that is determined solely by the IRS employee making the contact, it would make them a “nullity.”<sup>49</sup> The commentator recommended that reprisal determinations be documented and subject to supervisory review, but this comment was rejected without explanation. Nonetheless, it would make sense for a supervisor to ensure the employee considered reprisal and included some valid reason for any reprisal determination in the file.

### *Post-Examination Quality Reviews May Not Reliably Identify Third Party Contact Problems*

After the IRS closes an examination, its technical services function may review whether the examiner documented any applicable exceptions to the reporting requirements.<sup>50</sup> However, the reviewer would not necessarily look for anything more than something like: “No third party reporting is required because there is a risk of reprisal” (or some other conclusory justification).<sup>51</sup> Thus, an employee is not necessarily required to document the “good cause” underlying his or her reprisal determination. Although TAS’s sample included only seven reprisal determinations (six in collection and one in exam), employees did not document the reasons for those determinations in any the cases TAS reviewed.<sup>52</sup>

In theory, Field Exam National Quality Review System Attribute 617, which covers whether the taxpayer was “advised of all rights and kept informed throughout the examination process,” could cover failures to provide advanced notice of third party contacts.<sup>53</sup> Because the IRS does not associate a “reason code” with third party contact rule violations, however, the only way to determine if a failure for “other” reasons

46 Treas. Reg. § 301.7602-2(f)(3); IRM 4.11.57.4.2.3, *Reprisal* (Jan. 17, 2014); IRM 25.27.1.3, *Notification Requirements* (Jan. 16, 2014).

47 Authority to make the reprisal determination is delegated to Revenue Agents, Examination Aides, Tax Auditors, Revenue Officers, Tax Compliance Officers, Bankruptcy Specialists, GS-4 Tax Examiners, GS-5 Revenue Officer Aides, GS-5 Correspondence Examination Technicians, and GS-5 ACS Collection Representatives, among others. See IRM 1.2.52.13, *Delegation Order 25-12 (Rev. 1)* (May 22, 2009).

48 Treas. Reg. § 301.7602-2(f)(3)(i) (“A statement by the person contacted that harm may occur against any person is sufficient to constitute good cause for the IRS employee to believe that reprisal may occur. The IRS employee is not required to further question the contacted person about reprisal or otherwise make further inquiries regarding the statement”); Treas. Reg. § 301.7602-2(f)(3)(ii) (Ex. 1) (explaining a “contact is not excepted from the statute merely because the... [third party] asks that his name be left off the list of contacts.”).

49 T.D. 9028, 67 Fed. Reg. 77,419, 77,420 (Dec. 18, 2002).

50 IRM 4.8.8.18.3(3) (Dec. 6, 2013) (“The reviewer will review Form 9984 to ensure that the examiner documented whether the exceptions to the notice requirements of IRC 7602(c) applied...”).

51 Although not required by the current IRM, seemingly-obsolete training for TPC coordinators states that “[E]mployees *should* document the case file with the facts surrounding the decision and complete a Form 12175 as outlined above to document the reprisal determination.” IRS response to TAS information request (June 29, 2015) (emphasis added).

52 TPC Sample (2015) (Q8).

53 SB/SE, *Field Compliance Embedded Quality, Field Examination Attribute Job Aid*, Doc. 13128 (Dec. 2014); IRM Exhibit 4.8.3-1, *Quality Attributes* (Mar. 21, 2013).

is due to third party contact problems is to review the narrative provided by the reviewer.<sup>54</sup> When the IRS searched the narratives for FYs 2012-2014 cases closed by Small Business/Self-Employed (SB/SE) Division Revenue Agents (RAs) and Tax Compliance Officers (TCOs) that failed Attribute 617 for “other” reasons, it found no mention of third party contact violations. This may suggest that reviewers were not looking for such violations, perhaps because there was no reason code for them or because they were difficult to detect.<sup>55</sup>

One reason TPC reporting violations are difficult to detect is because employees are not always required to include the TPC’s identity on Form 12175 or the TPC database. For example, the contact’s name is omitted from the form when there is a risk of reprisal. To identify an incorrectly excluded contact, a reviewer would have to compare the TPCs in the paper case file (if any) with the number and date of those reflected in the TPC database. TAS’s review found that in 42.1 percent of the field exam cases non-exempt TPCs were missing from the TPC database.<sup>56</sup> Similarly, in a limited one-time review of certain field exam cases with TPCs, SB/SE found that in 36 percent, examiners did not properly document TPCs reflected in case histories on Form 12175.<sup>57</sup> Even where Form 12175 was used, only about 71 percent of the case histories included information about the contact.<sup>58</sup> Thus, it appears that the IRS’s regular field exam quality reviews do not effectively capture such omissions.

### *Post-Collection Quality Reviews May Not Reliably Identify Third Party Contact Problems*

The IRS also reviews closed collection cases to identify errors on specific quality attributes. Field collection quality Attribute 607 addresses whether “the Third Party Contact Database was [not] updated when identifiable third party contact was made.”<sup>59</sup> The IRS’s Integrated Collection System (ICS) functions as a Revenue Officer’s (RO) case activity record. It automatically updates the TPC database whenever a RO records an activity that involves a TPC (e.g., a levy). The RO records such activities by selecting them from a “pick list.” Except for cases involving Trust Fund Recovery Penalties or manual levies where the RO might instead use Form 12175, it is difficult for an RO to avoid updating the TPC database if he or she selects the appropriate pick list item.<sup>60</sup> Nonetheless, in nearly half (48.5 percent) of field collection cases TAS found non-exempt TPCs that were omitted from the TPC database.<sup>61</sup>

54 SB/SE RAs scored between 82.4 and 90.9 percent on attribute 617 over the last three years (FY 2012-2014) and SB/SE TCOs scored between 94.0 and 95.3 over the same period. IRS response to TAS information request (May 18, 2015).

55 IRS response to TAS information request (May 18, 2015). When it conducted the same review for RAs in Specialty Excise or Employment Tax, SB/SE found a few references to noncompliance with the third party contact rules. *Id.* These comments were associated with attribute 409 (appropriate procedural actions) or 609 (confidentiality), however. *Id.*

56 TPC Sample (2015) (Q9). As noted below, TAS’s review also identified nonexempt TPCs that were omitted from the TPC database in 48.5 percent of the field collection cases. *Id.* These omissions often (94.5 percent in exam cases and 34.5 percent in collection cases) occurred because the RA or RO did not send Form 12175 to the TPC coordinator, or in 57.2 percent of the collection cases, because the RO did not use the proper pick list item, as discussed below. *Id.* (Q10).

57 SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes* 5-6 (Oct. 30, 2015).

58 *Id.*

59 SB/SE, *Field Compliance Embedded Quality Field Collection (FC) Job Aid*, Doc. 12359, 27-28 (Dec. 2014) (Reason Code 5).

60 IRM 5.1.1.10.2, *TPC Reporting and Recording Procedures* (May 15, 2015) (“ICS systemically generates TPC data and updates the TPC Command Code database... Usually, the Form 12175 will not need to be completed by Collection personnel. Exceptions, however, are manually prepared levies, Trust Fund Recovery Penalty Investigations, Jeopardy and Other Investigations, templates or documents created in Word.”); ICS Users Guide at 10-31 and 29-11 to 29-15 (Jan. 2015).

61 TAS Sample (2015) (Q9). TAS reviewers concluded that 34.5 percent of these omissions resulted because the RO did not send Form 12175 to the TPC coordinator and 57.2 percent occurred because the RO did not select the proper entry from the ICS pick list. *Id.* (Q10).

Further, ROs failed to document a reason for their reprisal determinations in each of the six cases in TAS's sample where ROs made them.<sup>62</sup> Thus, Attribute 607 may not reliably identify all violations of the third party contact rules.

### The IRS Could Do More to Ensure Post-Contact Reports Are Accurate

To improve the accuracy of post-contact reports, the IRS could review the work completed by TPC coordinators.<sup>63</sup> Employees who send Form 12175 to the TPC coordinator could confirm its receipt, as they do when they transmit returns.<sup>64</sup> The IRS could also reconcile TPCs reflected in case histories with those found in the TPC database to ensure employees record TPCs on Form 12175 (when necessary) and the TPC coordinator enters them into the database.<sup>65</sup> As noted above, such controls will be less burdensome if the IRS increases the transparency of TPCs, for example, by sending the taxpayer a copy of any written request for information from a third party within three days of the contact, as it does in connection with third-party summonses.<sup>66</sup>

## CONCLUSION

Improving the TPC notice and reporting procedures would be consistent with the recently-adopted Taxpayer Bill of Rights. The taxpayer's *right to be informed*, as described in Pub 1, includes the right to "be informed of IRS decisions about their tax accounts and to receive clear explanations of the outcomes." Under current procedures, however, the IRS issues vague or non-specific TPC notices and potentially incomplete TPC reports that do not allow taxpayers to be informed about what information the IRS has decided it needs from third parties, whether it has actually contacted third parties, and how to obtain a list of the TPCs.

Pub 1 also explains that the taxpayer's *right to privacy* includes the right to "expect that any IRS inquiry... will comply with the law and be no more intrusive than necessary." With the possible exception of certain

62 TAS Sample (2015) (Q7 and Q8).

63 Except for personal performance appraisals, the IRS does not regularly evaluate the quality of the work completed by TPC coordinators, nor does it regularly reconcile TPCs reflected in case histories with those found in the TPC database to ensure employees record TPCs on Form 12175 (when necessary) and the TPC coordinator enters them into the database. IRS response to TAS fact check (Nov. 10, 2015).

64 According to a limited review of certain field exam cases by SB/SE, in 36 percent the examiner did not properly record the contact on Forms 12175. SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes* 5 (Oct. 30, 2015). Even when examiners filled out Form 12175 it only reached the TPC 92 percent of the time. *Id.* at 6. When an IRS employee ships one or more returns, he or she must include Form 3210, *Document Transmittal*, to provide a method for tracking their receipt. Form 3210 can be manually prepared or computer generated by ERCS. It must identify the taxpayer's name, tax period(s), to whom it is being sent, the originator, and the date sent. The sender must sign and date the form and keep a portion. Upon receipt of the return(s), the recipient must verify the contents, sign Form 3210, and return the acknowledgment portion to the sender. See, e.g., IRM 1.4.40.4.2.6, *Shipment of Returns* (May 19, 2010).

65 IRS field exam embedded quality Attribute 617 addresses third party contacts. See IRM 4.11.57.1, *References - Third Party Contacts* (Jan. 17, 2014). However, it only seems to address whether the IRS informed the taxpayer that a TPC could occur (e.g., by sending Pub 1). See IRM Exhibit 4.8.3-1, *Quality Attributes* (Mar. 21, 2013) ("This Attribute [617] measures if the taxpayer/representative was advised of all rights and kept informed throughout the examination process."). By contrast, SB/SE's Field Collection quality measures are more specific, addressing whether "[T]he Third Party Contact Database was not updated when an identifiable third party contact was made." SB/SE, *Field Compliance Embedded Quality Field Collection (FC) Job Aid*, Doc. 12359, 27-28 (Dec. 2014) (Reason Code 5). As noted above, however, automated systems often update the TPC database for collection employees. See, e.g., IRM 5.1.1.10, *Third Party Contacts* (May 15, 2014); ICS Users Guide at 10-31 and 29-11 (Jan. 2015). The IRS does not measure whether employees ask taxpayers for specific information before making TPCs to obtain it.

66 Under IRC § 7609(a), the IRS must provide the taxpayer a copy of a third-party summons within three days of serving it on the third party and no later than the 23rd day before the third party has to produce the records or testimony. The IRS could use the three day period to determine if the TPC is exempt from the TPC notice and reporting requirements (e.g., because of the potential for reprisal).

cases where the IRS needs to verify information already provided by the taxpayer, TPCs will be more intrusive than necessary unless the IRS gives the taxpayer a reasonable opportunity to provide information needed to avoid the TPC. No such reasonable opportunity exists if the taxpayer does not know the specific information the IRS needs or is not given enough time to respond.

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### The IRS's current third party contact procedures dilute five of the ten taxpayer rights adopted by the IRS.

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Moreover, Pub 1 states that taxpayers have the *right to challenge the IRS's position and be heard*, which includes the "... right to raise objections and provide additional documentation in response to formal IRS actions or proposed actions, to expect that the IRS will consider their timely objections and documentation promptly and fairly, and to receive a response if the IRS does not agree with their position." If the IRS does not inform the taxpayer about what specific information it plans to seek from third parties (or does not provide the taxpayer enough time to respond), then the taxpayer does not have a realistic opportunity to raise objections or provide additional documentation for the IRS to consider.

In furtherance of the *rights to be informed, to privacy, and to challenge the IRS's position and be heard*, the IRS should include with the TPC notice a request for information, which would make the TPC unnecessary, except where the IRS employee documents why a TPC notice exception applies. Before making a TPC, the IRS should send the taxpayer a TPC notice that asks for the specific information it is planning to request from a third party (except in cases where such a request would be unproductive, such as where it needs to verify information already provided). It should not make the TPC if the taxpayer responds by providing (or agreeing to provide) the information within a reasonable period. It should also send taxpayers periodic reports of TPCs, as required by IRC § 7602(c)(3).

These recommendations are also consistent with the taxpayer's *right to a fair and just tax system*. Empowering only some taxpayers but not others to exercise their rights to avoid TPCs (*e.g.*, by letting them know what information they could provide to avoid it) or learn about TPCs (*e.g.*, by describing how to request TPC reports) is inconsistent with the *right to a fair and just tax system*.

In addition, Pub 1 states that the taxpayer's *right to confidentiality* includes the right to "expect that any information they provide to the IRS will not be disclosed unless authorized... [and] to expect that appropriate action will be taken against employees... who wrongfully use or disclose return information." IRS employees are only "authorized" to make TPCs, which necessarily disclose confidential taxpayer information, if they comply with the TPC notice requirements. Yet, the IRS's internal controls do not ensure it knows when employees wrongfully disclose confidential information by making TPCs that do not comply with IRC § 7602(c). Thus, the IRS's current TPC procedures dilute five of the ten taxpayer rights adopted by the IRS.

## RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Include with a TPC notice a specific request for information that would make the TPC unnecessary, except where the IRS employee documents that a TPC notice exception applies or that requesting the information from the taxpayer would be pointless (*e.g.*, because the IRS needs to verify information already provided).<sup>67</sup>
2. Allow the taxpayer at least ten days to provide the information being requested before making the third party contact to obtain it.<sup>68</sup>
3. Send the taxpayer a copy of any written request for information from a third party within three days of any non-exempt contact (except in collection cases), as the IRS does in connection with third-party summonses.<sup>69</sup>
4. Provide taxpayers with periodic TPC reports of TPCs not already provided (if any), as required by IRC § 7602(c)(3).<sup>70</sup>
5. Modify TPC notices to inform taxpayers of their right to receive post-TPC reports periodically and to explain how to request these reports.
6. Require employees to document the basis (*i.e.*, “good cause”) for the reprisal and other exceptions to TPC reporting, require supervisory review of such documentation, and train employees on how to apply them.<sup>71</sup>
7. Improve measures to ensure management knows when and how employees are not following TPC procedures.<sup>72</sup> For example, the IRS’s reviews should regularly compare TPCs reflected in the administrative file to those reported to TPC coordinators (*e.g.*, through supervisory, quality, or operational reviews) and require TPC coordinators to acknowledge receipt of these forms. To facilitate these reviews, the IRS may need to require employees to include information on the Form 12175 that it can tie back to the TPCs referenced in the administrative file in cases where a reporting exception applies (*e.g.*, reprisal).

67 The IRS could return to its prior practice of using Letter 3164-G (DO), (Exam-3) Third Party Contact Letter, and Letter 3164-F (DO), (Exam-2) Third Party Contact Letter, for this purpose.

68 In the context of an examination, a taxpayer is notified when the Service issues a third-party summons, and the Service is required to wait 23 days before taking the summoned records. IRC § 7609(a). A collection summons is excepted from those procedures by IRC § 7609(c) to prevent the taxpayer from relocating and hiding assets. H.R. REP. 94-658, 94th Cong., 2nd Sess. at 3206 (1976). In collection cases, however, the IRS still allows at least ten days for the production of summoned records. See IRM 25.5.3.4, *Time and Place of Examination Set by Summons* (July 11, 2013).

69 In collection cases, the taxpayer could still mitigate the damage resulting from the contacts by requesting a TPC list.

70 Such periodic TPC reports would be unnecessary if the IRS had already reported all TPCs to the taxpayer, as recommended.

71 The supervisory review and training would ensure employees are familiar with the TPC rules, including IRM 25.27.1.3.3(4), which requires them to describe good cause in the case history by documenting “the facts surrounding the reason for the reprisal determination” and that they do not apply the exception based solely on an unexplained request by a third party for his or her name to be left off of the list of contacts provided to the taxpayer. See, *e.g.*, Treas. Reg. § 301.7602-2(f)(3)(ii) (Ex. 1) (explaining a “contact is not excepted from the statute merely because the... [third party] asks that his name be left off the list of contacts.”). An SB/SE review supports the need for training. It found that a focus group of field examiners had not received any refresher TPC training and could answer polling questions about what is or is not a TPC only 84 percent of the time; and SB/SE’s case reviews found that examiners did not document consideration of the potential for reprisal in any cases SB/SE reviewed. SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes 5-6* (Oct. 30, 2015).

72 Similarly, an SB/SE review recommended the addition of a new reason code to the Exam Quality Measurement System (EQMS) to track adherence to TPC procedures. SB/SE, *Third Party Contact, Program Review Report, Field Exam Special Processes 8* (Oct. 30, 2015).

## Appendix: Third Party Contact Sampling Methodology and Data Collection Instrument

### Methodology

TAS identified a stratified random sample of 1,200 taxpayers whose cases were closed in field exam (600 cases) or field collection (600 cases) in FY 2013. The sample was larger than necessary to project the results to IRS cases nationwide because TAS expected that some case files would not be retrieved in time to complete the study. In addition, TAS oversampled the types of cases (identified by activity code and project code) deemed most likely to involve TPCs so that the sample would yield more precise estimates about how the IRS handles the relatively small percentage of cases that require TPCs.<sup>73</sup> Five TAS Revenue Agent Technical Advisors (RATAs) and four TAS Revenue Officer Technical Advisors (ROTAs) ordered the administrative files and a copy of the IRS's TPC database (*i.e.*, data available on IDRS) for these randomly selected cases. After TAS identified the subset of cases where taxpayers requested TPC lists, it planned to request information about the IRS's responses (*e.g.*, Letter 3173) in these cases from the IRS. However, TAS did not identify any cases where the taxpayer requested a TPC list. The ROTAs and RATAs recorded their findings on an electronic data collection instrument (DCI). TAS research tabulated the data. These results are analyzed in the body of the Most Serious Problem (MSP) above.

### Data Collection Instrument

The DCI used by TAS reviewers included the following questions:

1. Did the RA/RO make any third party contacts (TPC)?
2. Were all of the TPCs exempt from the notice and reporting requirements (*e.g.*, authorized on Form 12180, criminal investigation, risk of reprisal, collection in jeopardy, matter in litigation, and certain contacts with contractors, informants, or government officials)?
3. On what date was the first non-exempt TPC?
4. Did the IRS send the taxpayer a TPC notice (*e.g.*, Pub 1, Letters 3164, 3230, 3232, 3234, 3236, 3238, 3345, 3404, 4464, or Notice 1219)?
5. If the RA/RO sent a TPC notice, did the RO/RA wait until the (a) confirming receipt of the TPC notice or (b) at least ten calendar days after sending the TPC notice before making the first non-exempt TPC (as required by IRM 4.11.57.4.1.1.1 and IRM 25.27.1.3.1)?
6. Did the RA/RO ask the taxpayer for the information before requesting it from a third party? (For example, a formal request for specific information through personal contact or letter.)
7. Did the RA/RO determine a "reprisal" TPC reporting exception applied (as provided by IRC § 7602(c)(3), IRM 25.27.1.3.3, or IRM 4.11.57.4.2.3)?
8. If the RO/RA determined the reprisal exception applied, did the RA/RO document the reason(s) why?

<sup>73</sup> Field exam cases consisted of two strata: one with certain activity codes and project codes, and the other with the remaining field exam cases. Field collection cases were divided into six strata: (1) individual closed as full paid or with an installment agreement, (2) individual closed as currently not collectible, (3) individual trust fund recovery penalty, (4) individual referred to exam and closed as full paid or with an installment agreement, (5) small business closed as full paid or with an installment agreement, and (6) small business closed as currently not collectible. Each strata was weighted to reflect the proportion of that strata in the population.

9. Does the admin file (case activity record (CAR), Forms 12175, Integrated Collection System (ICS), or memo of interview (MOI)) show one or more non-exempt TPCs that are not reflected on the TPC Coordinator database?
10. Why were one or more TPCs omitted from the TPC database? [Choices included “Form 12175 not completed” or “other” with an explanation.]
11. Did the taxpayer request a TPC list? [yes/no and date recorded]
12. If the taxpayer requested one or more TPC list(s), did the IRS always mail/fax the list (e.g., Letter 3173) within 10 working days (per IRMs 4.11.57.4.6 and 25.27.1.5)?
13. If the IRS sent a TPC list, were there non-exempt TPCs in the admin file that were omitted from the list and not previously disclosed to the taxpayer (e.g., in response to a prior request or on a third-party summons or CDP notice)?

### Sample Results

The tables below summarize the results of TAS’s sample, which are discussed in the MSP (above). The “counts” reflect the number of times a result was observed in the sample. Because TAS did not review all of the IRS’s cases, the “estimate” column reflects how many times we would expect a particular result to occur in the overall population of IRS cases. The results from the sample were weighted so that the extent to which TAS over or under-sampled a particular project code did not bias the results. The upper and lower bounds of the “95% Confidence Interval” shows how close the estimate is likely to be to the true value for the entire population of IRS exam or collection cases at 95 percent level of confidence.<sup>74</sup> This range is generally wider for questions that were not answered very often (*i.e.*, for which the sample has relatively few data points) because the estimates become more precise when you have more data points.

#### 1. Did the RA/RO make any third party contacts (TPC)?

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	No	31.9%	2.5%	27.2%	37.0%	151
	Yes	68.1%	2.5%	63.0%	72.8%	272
	<b>Total</b>					<b>423</b>
Field Exam	No	91.5%	1.5%	88.1%	94.1%	435
	Yes	8.5%	1.5%	5.9%	11.9%	50
	<b>Total</b>					<b>485</b>

<sup>74</sup> Unless otherwise indicated, TAS assumed reviewers only left questions blank if they could not determine how to answer them based on the information in the case file.



**2. Were all of the TPCs exempt from the notice and reporting requirements (e.g., authorized on Form 12180, criminal investigation, risk of reprisal, collection in jeopardy, matter in litigation, and certain contacts with contractors, informants, or government officials)?**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	0.3%	0.3%	0.1%	1.9%	2
	No	96.3%	1.2%	93.1%	98.1%	261
	Yes	3.4%	1.2%	1.7%	6.6%	9
	<b>Total</b>					<b>272</b>
Field Exam	Missing	4.0%	3.9%	0.6%	23.7%	1
	No	47.2%	9.3%	30.0%	65.1%	23
	Yes	48.8%	9.3%	31.4%	66.5%	26
	<b>Total</b>					<b>50</b>

**4. Did the IRS send the taxpayer a TPC notice (e.g., Pub 1, Letters 3164, 3230, 3232, 3234, 3236, 3238, 3345, 3404, 4464, or Notice 1219)?**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	3.6%	1.3%	1.8%	7.2%	8
	No	0.8%	0.6%	0.2%	3.2%	3
	Yes	95.5%	1.4%	91.8%	97.6%	250
	<b>Total</b>					<b>261</b>
Field Exam	Missing	1.1%	1.2%	0.2%	8.2%	1
	Yes	98.9%	1.2%	91.8%	99.8%	22
	<b>Total</b>					<b>23</b>

**5. If the RA/RO sent a TPC notice, did the RO/RA wait until the (a) confirming receipt of the TPC notice or (b) at least ten calendar days after sending the TPC notice before making the first non-exempt TPC (as required by IRM 4.11.57.4.1.1.1 and IRM 25.27.1.3.1)?<sup>75</sup>**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	72.1%	3.0%	65.8%	77.7%	180
	No	5.3%	1.5%	3.0%	9.2%	14
	Yes	22.5%	2.8%	17.5%	28.6%	56
	<b>Total</b>					<b>250</b>
Field Exam	No	2.3%	1.7%	0.5%	9.7%	2
	Yes	97.7%	1.7%	90.3%	99.5%	20
	<b>Total</b>					<b>22</b>

**6. Did the RA/RO ask the taxpayer for the information before requesting it from a third party? (For example, a formal request for specific information through personal contact or letter)<sup>76</sup>**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	14.0%	2.3%	10.1%	19.1%	39
	No	11.1%	2.0%	7.8%	15.6%	34
	Yes	75.0%	2.8%	69.1%	80.1%	199
	<b>Total</b>					<b>272</b>
Field Exam	Missing	22.2%	7.9%	10.4%	41.3%	9
	No	22.8%	7.9%	10.8%	41.7%	10
	Yes	55.0%	9.3%	36.8%	71.9%	31
	<b>Total</b>					<b>50</b>

<sup>75</sup> TAS reviewers left this question (Q5) blank if the RO/RA did not send the taxpayer a TPC letter, even if some other part of the IRS had done so.

<sup>76</sup> A very broad request for information from the taxpayer that might technically have covered the information later included in the specific request to the third party was scored as "NO" (for Q6) if it would not have occurred to the taxpayer to provide such information because the IRS did not identify what it wanted with enough specificity.

**7. Did the RA/RO determine a “reprisal” TPC reporting exception applied (as provided by IRC § 7602(c)(3), IRM 25.27.1.3.3, or IRM 4.11.57.4.2.3)?**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	25.1%	2.8%	20.0%	31.0%	71
	No	72.9%	2.9%	66.9%	78.1%	195
	Yes	2.0%	0.8%	0.9%	4.5%	6
	<b>Total</b>					<b>272</b>
Field Exam	Missing	8.6%	5.4%	2.3%	26.9%	3
	No	87.4%	6.5%	68.6%	95.7%	46
	Yes	4.0%	3.9%	0.6%	23.7%	1
	<b>Total</b>					<b>50</b>

**8. If the RO/RA determined the reprisal exception applied, did the RA/RO document the reason(s) why?<sup>77</sup>**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	No	100.0%	0.0%	100.0%	100.0%	6
	<b>Total</b>					<b>6</b>
Field Exam	No	100.0%	0.0%	100.0%	100.0%	1
	<b>Total</b>					<b>1</b>

**9. Does the admin file (case activity record (CAR), Forms 12175, Integrated Collection System (ICS), or memo of interview (MOI)) show one or more non-exempt TPCs that are not reflected on the TPC Coordinator database?**

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	No	51.5%	3.3%	44.9%	58.0%	137
	Yes	48.5%	3.3%	42.0%	55.1%	124
	<b>Total</b>					<b>261</b>
Field Exam	No	57.9%	13.4%	31.8%	80.2%	12
	Yes	42.1%	13.4%	19.8%	68.2%	11
	<b>Total</b>					<b>23</b>

<sup>77</sup> To improve consistency, TAS had a single reviewer examine each of the seven field collection cases. In the absence of any indication the third party actually feared reprisal, documentation that a third party “did not want to be named” was not treated as a documented reason for a reprisal determination. Similar verbiage was present in three of the collection cases TAS reviewed, but there was no express indication this was the basis for the determination. Thus, TAS avoided inferring that the RO applied the reprisal rules incorrectly. See, e.g., Treas. Reg. § 301.7602-2(f)(3)(ii) (Ex.1) (explaining a “contact is not excepted from the statute merely because the... [third party] asks that his name be left off the list of contacts.”). Rather, TAS assumed the RO had other undocumented reasons for making the reprisal determination.

### 10. Why were one or more TPCs omitted from the TPC database?<sup>78</sup>

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Form 12175 Not Used	34.5%	4.6%	26.1%	44.0%	43
	Pick List Not Used	57.2%	4.7%	47.7%	66.2%	70
	Other	8.3%	2.5%	4.4%	14.9%	11
	<b>Total</b>					<b>126</b>
Field Exam	Form 12175 Not Used	94.5%	4.3%	76.9%	98.9%	9
	Other	5.5%	4.3%	1.1%	23.1%	2
	<b>Total</b>					<b>11</b>

### 11. Did the taxpayer request a TPC list?

		Estimate	Standard Error	95% Confidence Interval		Unweighted Count
				Lower	Upper	
Field Collection	Missing	0.8%	0.6%	0.2%	3.2%	3
	No	99.2%	0.6%	96.8%	99.8%	258
	<b>Total</b>					<b>261</b>
Field Exam	No	100.0%	0.0%	0.0%	100.0%	23
	<b>Total</b>					<b>23</b>

<sup>78</sup> Because TAS reviewers frequently indicated that the “other” reason was that ROs did not select the correct pick list item, TAS compiled and reported these results separately.