

Area of Focus #11 **Implementation of Congress's Recent, Sweeping Changes to the Individual Taxpayer Identification Number (ITIN) Program Present Significant Challenges to Both Taxpayers and the IRS**

TAXPAYER RIGHTS IMPACTED¹

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

ITINs are needed by taxpayers who have a tax return filing requirement but are not eligible for a Social Security number (SSN).² In recent years, an average of 4.6 million taxpayers filed returns that included an ITIN.³ During the calendar year (CY) 2015, the IRS received approximately 870,000 Forms W-7, *Application for IRS Individual Taxpayer Identification Number*.⁴ When taxpayers cannot obtain ITINs, they may experience financial hardship, miss out on tax benefits, and face business limitations.

Since 2003, the National Taxpayer Advocate has drawn attention to systemic problems in the IRS's ITIN application procedures.⁵ In late 2015, Congress passed the Consolidated Appropriations Act, 2016 (hereinafter 2016 Act), which made some significant changes to the ITIN application procedures, as well as codified some previous requirements.⁶ The 2016 Act creates some limitations and restrictions that will likely make it more difficult for taxpayers to receive ITINs and claim certain tax benefits. However, the impact of the legislation largely depends on how the IRS interprets and implements the law through formal and informal guidance.

To date, the IRS has provided little information to the public regarding how it will interpret and implement the new requirements that are sweeping in their reach.⁷ Notwithstanding the IRS's commitment to the National Taxpayer Advocate that TAS would be included on IRS teams and be involved in the effort to evaluate and implement the legislative changes, it was only after personal intervention by the National Taxpayer Advocate that TAS was provided a briefing on June 9, 2016. The National Taxpayer Advocate hopes the IRS will follow through with its commitment to provide more regular briefings to TAS as it takes steps to implement the legislation. Furthermore, TAS should not merely be briefed on

- 1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).
- 2 IRC § 6109 specifies that any person required to make a return, statement, or other document must use a taxpayer identifying number in accordance with forms and instructions. An ITIN is the taxpayer identifying number issued by the IRS to anyone who is not eligible for an SSN. Treas. Reg. § 301.6109-1(d)(3)(ii). In general, an individual required to furnish a taxpayer identifying number but who isn't eligible for an SSN must use an ITIN. Treas. Reg. § 301.6109-1(a)(1)(ii)(B).
- 3 During processing years (PYs) 2012-2014, an average of 4.6 million Form 1040 returns were filed having an ITIN for either the primary or secondary (e.g., spouse) filers or a dependent. IRS, Compliance Data Warehouse (CDW), Individual Returns Transaction File (IRTF) and Form W-7 Databases (Dec. 15, 2015).
- 4 IRS, *ITIN Production Yearly Comparative Reports* (Dec. 30, 2015).
- 5 See, e.g., National Taxpayer Advocate 2015 Annual Report to Congress 196-212 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers*); National Taxpayer Advocate 2003 Annual Report to Congress 60-86 (Most Serious Problem: *Individual Taxpayer Identification Number (ITIN) Program and Application Process*).
- 6 See 2016 Act, Pub. L. No. 114-113, Division Q, Title II, § 203 (2015).
- 7 IRS, *Individual Taxpayer Identification Number (ITIN)*, <https://www.irs.gov/Individuals/Individual-Taxpayer-Identification-Number-ITIN> (last updated May 2, 2016).

already formulated decisions and proposals, but should be included as an active member of the major implementation teams and efforts.

TAS is statutorily required to assist taxpayers in resolving problems with the IRS,⁸ and works hundreds of cases related to ITINs each year.⁹ TAS also oversees the Low Income Taxpayer Clinics (LITCs), which are statutorily required to conduct outreach and education to taxpayers for whom English is a second language.¹⁰ LITCs are also expected to identify systemic issues and advocate for change to help low income taxpayers.¹¹ Thus, LITCs are a valuable source of information and assistance for a vulnerable ITIN population and by excluding TAS in the ITIN discussion, the IRS excludes LITCs as an important resource.

Despite its failure to include TAS in its initial deliberations, the IRS has stated it is actively reviewing the legislation. On February 22, 2016, the IRS updated its ITIN web page for the general public and simultaneously issued an internal alert to employees regarding the 2016 Act, stating: “We are still evaluating the changes required to implement the new legislation. Further details will be posted on irs.gov in the coming months. Until then, ITINs will continue to be issued using existing policies and procedures.”¹²

Although the National Taxpayer Advocate understands the IRS is wrestling with some substantial barriers in terms of implementing the legislation as written and under the set timeframe, she has also heard from stakeholders at the Public Forums who are gravely concerned with the potential consequences of the legislation and the current lack of answers provided by the IRS.¹³ The National Taxpayer Advocate is concerned that the IRS has failed to share information regarding:

- How it will change application procedures to provide additional options and flexibility for ITIN applicants in light of the legislation’s new restrictions (such as the limitation on Certifying Acceptance Agents (CAAs) to only assist taxpayers in the United States,¹⁴ and the new time pressure to receive an ITIN before the tax return due date if claiming the Child Tax Credit (CTC) or American Opportunity Tax Credit (AOTC)¹⁵) and to address pre-existing problems with the application process such as the need to mail original documents;

8 IRC § 7803(c)(2)(A)(i).

9 As of the week ending May 21, 2016, TAS had already received 598 cases related to ITINs for fiscal year (FY) 2016. During FY 2015, TAS received 775 cases. Cases were identified by the primary issue code “Form W-7/ITIN/ATIN.” TAS Weekly Inventory Report (May 15, 2016–May 21, 2016). An ATIN is an Adoption Taxpayer Identification Number, which is used temporarily in connection with tax return filing requirements until the adoptive child receives an SSN. See Treas. Reg. § 301.6109-3(a)(1). See also Internal Revenue Manual (IRM) 3.13.40.1.1, *Characteristics of an ATIN* (Jan. 1, 2015).

10 See IRC § 7526(b)(1)(A)(ii)(II).

11 See IRS Pub. 3319, *2017 LITC Grant Application Package and Guidelines* (Rev. 4-2016).

12 IRS, *Individual Taxpayer Identification Number (ITIN)*, <https://www.irs.gov/Individuals/Individual-Taxpayer-Identification-Number-ITIN> (updated May 2, 2016); IRS, SERP Alert 16A0090, *Standard Language to Use for Inquiries About PATH Legislation and ITINs* (Feb. 22, 2016). At a conference of the American Bar Association on May 6, 2016, an IRS official did not provide many details, but stated that the IRS was still considering the best ways to implement the legislative changes from the 2016 Act. David van den Berg, *IRS Working to Implement Legislative ITIN Changes*, 2016 TAX NOTES TODAY 90–12 (May 10, 2016).

13 See, e.g., Oral Statement of Cheryl Reidlinger, National Taxpayer Advocate Public Forum (Apr. 4, 2016).

14 See 2016 Act, § 203(a). Congress has introduced legislation to clarify that CAAs are available for ITIN applicants outside the United States. See Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e) (2016); H.R. 4891, 114th Cong. § 2(e) (2016). However, geographic coverage of CAAs abroad has been deficient in the past. See National Taxpayer Advocate 2015 Annual Report to Congress 208–09.

15 See 2016 Act, §§ 205, 206 (disallowing claims for the CTC and AOTC where the ITIN is not issued until after the due date for filing the tax return for that year).

- How will it define the return due date for the purposes of the provisions disallowing the CTC and AOTC for otherwise eligible taxpayers if their ITINs are not processed by the due date,¹⁶ and how it will ensure that ITIN applications are processed more quickly and efficiently so all eligible applicants can receive the CTC and AOTC for the year in which they apply for an ITIN;
- How it will define “certified copies” and expand the CAA program; and
- How it will notify ITIN holders that their ITINs will be deactivated, how it will handle ITINs that have been deactivated but are still being used on third-party information returns, and whether ITIN holders will have to go through the full application process to reactivate a deactivated ITIN or apply for a new one.

Additionally, the IRS has not identified a definitive time period within which it will provide further information to taxpayers and employees. Although TAS is aware the IRS has met with some external stakeholders regarding its future ITIN plans, the process of soliciting the perspectives of stakeholders seems to be taking place behind closed doors, with the IRS choosing with whom it wants to meet and offering no publicized opportunity for taxpayers, practitioners, and other stakeholders to voice their concerns.

TAS will be actively monitoring changes to the ITIN program and will continue to seek answers to the above questions, while advocating for changes that protect taxpayer rights and allow taxpayers to meet their tax obligations.

The New Law Provides the IRS With the Opportunity to Develop Additional Options for ITIN Applicants, But the IRS Has Not Announced Any Changes to the Application Procedures to Further the Ability of Applicants to Apply for ITINs

Under the 2016 Act, ITIN applicants in the United States must apply either in person to an IRS employee, in person to a CAA, or by mail.¹⁷ In essence, this requirement codifies the IRS’s prior administrative policy, while allowing the IRS the flexibility to enhance any of the existing options. For example, the IRS could increase locations in which IRS employees can certify ITIN applications or expand the CAA program. However, the IRS has historically declined to make any of these options more accessible.¹⁸

Applicants Face Barriers to Applying for ITINs at Taxpayer Assistance Centers (TACs)

Applying in person to an IRS employee is a poor option due to the limitations of TACs. During the 2016 filing season, the IRS declined to add any additional TACs providing ITIN certification services beyond the 186 TACs that provided these services in 2015.¹⁹ Furthermore, taxpayers seeking assistance at TACs have faced a multitude of barriers this filing season, including being turned away from appointment-only TACs and not receiving service or being forced to wait hours to receive service at a non-appointment TAC.²⁰ Of those taxpayers who successfully made an appointment at a TAC during the 2015 filing season, half had to wait between six days and six weeks (or more for the top five percent)

16 See 2016 Act, §§ 205, 206.

17 2016 Act, § 203(a) (codified at IRC § 6109(i)).

18 See National Taxpayer Advocate 2015 Annual Report to Congress 196-212 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers*).

19 See IRS, *Taxpayer Assistance Center Locations Where In-Person Document Review is Provided*, <https://www.irs.gov/uac/TAC-Locations-Where-In-Person-Document-Verification-is-Provided> (last updated Mar. 2, 2016).

20 See Review of the 2016 Filing Season, *supra*.

for an appointment.²¹ In addition, TACs can only certify two of the 13 types of required documents — passports and national identification cards.²² The 2016 Act suggests the IRS may move in the direction of requiring in-person interviews for ITIN applications;²³ however, the IRS has been silent on whether it will be expanding the number of TACs that offer ITIN certification services and the types of ITIN supporting documents that TACs can certify.

CAAs Cannot Certify Documents for Dependent Applicants

CAAs are not a viable alternative for many taxpayers because there are only a limited number of CAAs and they cannot certify ITIN identification documents for dependents,²⁴ which make up approximately 44 percent of all ITIN applicants.²⁵ TAS understands the IRS may consider expanding the ability of CAAs to review certain documents for dependents.²⁶ It is crucial for the IRS to solicit comments regarding any such proposal from stakeholders, such as LITCs and CAAs, who have direct knowledge of the types of documents commonly submitted by dependents, the barriers to gathering different types of documents, and the difficulties with validating identity and identifying fraud based on certain documents. Without considering these needs, any benefits may be limited. As an example, the IRS recently finished a pilot program, which allowed a select number of Volunteer Income Tax Assistance and Tax Counseling for the Elderly (VITA/TCE) sites to certify passports and national I.D. cards for dependents.²⁷ The pilot may not have a substantial impact on the number of dependents mailing original documents because these applicants are likely to do so either because they live in a location where there is not an accessible TAC (making it unlikely there is an accessible VITA/TCE site), or they need to use documents other than a passport or national I.D. card to prove their identities. Thus, it is vital for the IRS to provide notice and an opportunity for public comment regarding the expanded abilities of CAAs.

Although the pilot suggests a possible expansion of the VITA CAA program, VITA sites are currently limited by seemingly contradictory restrictions — for a VITA site to become a CAA, the responsible officer on the CAA application must be a permanent employee of the VITA site (not a volunteer),²⁸ yet CAAs are not included in the list of employees who can be provided compensation under the IRS VITA

21 See IRS, *Field Assistance Appointment Test Report-Executive Briefing*, at 7 (Jan. 13, 2016) (on file with TAS). Fifty percent of taxpayers received appointments in about six days, but 20 percent had to wait between 13 and 41 days, and five percent had to wait 41 or more days. These numbers did not include taxpayers who did not show up for their appointments, which may have increased the average wait times for an appointment.

22 IRM 3.21.263.6.1.5, *Supporting Identification Documentation and Other Required Documentation* (Jan. 1, 2016). The 13 types of supporting documentation are listed in the instructions to Form W-7.

23 See 2016 Act, § 203(d)(2)(B), which requires the IRS to conduct a study on the characteristics of ITIN applicants, and states: “If data supports an in-person initial review of ITIN applications to reduce fraud and improper payments, the administrative and legislative steps needed to implement such an in-person initial review of ITIN applications, in conjunction with an expansion of the community-based certified acceptance agent program under subsection (c), with a goal of transitioning to such a program by 2020.”

24 See IRM 3.21.264.2, *General Information* (Oct. 21, 2015).

25 In CY 2014, dependents comprised approximately 44 percent of ITIN applicants. IRS, CDW, Form W-7 Database (Dec. 15, 2015). Dependents may face difficulty in meeting the ITIN application requirements, as evidenced by the fact that of the approximately 633,000 ITINs assigned in CY 2014, only 29 percent were claimed on returns as dependents. ITIN application information for CYs 2015 and 2016 are not available due to a programming error that caused only about half of Form W-7 records being transferred to the IRS’s CDW from the ITIN Real Time System (RTS). The IRS informed TAS that the corrected data for 2015 would not be available until early/mid 2016 and suggested that TAS exclude characteristics of 2015 Form W-7 applicants from this report.

26 Conference call between Wage and Investment Operating Division (W&I) and TAS (June 9, 2016).

27 See IRS, *Authenticating Identification Documents for Dependents at Stakeholder Partnership, Education & Communication (SPEC) CAA VITA Sites* (Oct. 29, 2015) (on file with TAS); IRS response to TAS information request (June 10, 2016). The pilot was conducted September 21, 2015 through April 18, 2016, and the result will be issued on July 29, 2016.

28 IRS Fact Sheet for SPEC Partners, SPEC CAA Initiative (Dec. 2015).

grant program.²⁹ To boost participation from VITA CAAs, the IRS should clarify that CAAs can either be volunteers or are eligible to receive compensation under the VITA grant program.

IRS Policies Limit Participation in the CAA Program

Although the 2016 Act envisions an overall expansion of the CAA program,³⁰ the IRS has not communicated what actions it will take to encourage participation in the CAA program. As of June 10, 2016, the IRS had not updated the instructions for Form 13551, *Application to Participate in the IRS Acceptance Agent Program*, to reflect the expanded list of persons eligible to become CAAs.³¹ Furthermore, the IRS has not expanded the timeframe for CAAs to apply, which remains May 1–August 31 of each year.³²

The IRS has not revised its procedures regarding rejecting CAA applications, which provide that if an application is returned to an applicant for missing or incomplete information, and the applicant fails to provide the missing information to the IRS's satisfaction within 30 days, the application is rejected and the applicant cannot reapply until the next open season, which may be up to a year later.³³ Even worse, if an application is returned for a problem with a signature, a recent draft of Letter 5612 indicates applicants only have 15 days from the date of the letter for the IRS to receive their response.³⁴ The limited timeframe for applying, paired with the inability for CAAs to appeal a rejected application and reapply before the next open season, unnecessarily restricts participation in the CAA program, despite Congress's intent for the IRS to expand the program.

Most ITIN Applicants Mail Original Documents Despite Problems With This Method

Mailing original documents or copies certified by the issuing agency remains the only alternative to applying at a TAC or through a CAA. TAS continues to see problems with applicants whose original ID documents are lost or who face a hardship due to the amount of time they must go without their original documents. In 2015, TAS issued 132 Operations Assistance Requests (OARs)³⁵ to the IRS, requesting the IRS locate a taxpayer's passport and return it by expedited mail due to an urgent need.³⁶ Examples from these cases include taxpayers needing their original passports back in order to:

- Cash an employment check with the passport needed as a valid identification document;
- Travel abroad for business or a family emergency;
- Present the passport during a meeting with immigration officials or to renew a visa; and

29 IRM 22.30.1.3.3.1.2, *Compensation for the Grant Program* (Oct. 1, 2011).

30 The law expands the list of persons eligible to be CAAs, which includes among others, state and local governments, federal agencies, and other persons or categories authorized by regulations or IRS guidance. See 2016 Act, § 203(c). As part of a required study on the effectiveness of the application process for ITINs, the IRS must evaluate ways to expand the geographic availability of CAAs and strategies to work with other federal agencies, state and local governments, and other organizations to encourage participation in the CAA program. *Id.* at § 203(d).

31 See IRS Form 13551, *Application to Participate in the IRS Acceptance Agent Program* (Aug. 2014).

32 *Id.*

33 See IRM 3.21.264.4.6.2, *Failure to Respond Within 30 Days or Provide Missing Information* (May 9, 2016).

34 See IRS Letter 5612 (X-2016) (on file with TAS). A copy of this draft letter was shared with TAS on May 9, 2016. Should Congress pass the Technical Corrections Act of 2016 (which would allow CAAs to assist taxpayers abroad), the result of this policy will be especially harsh considering the infeasibility for CAAs abroad to receive and return international mail within 15 days. See Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e) (2016); H.R. 4891, 114th Cong. § 2(e) (2016).

35 IRS Form 12183, *Operations Assistance Request (OAR)* (Rev.3-2003) is the form TAS uses to request the IRS take an action on a case when TAS lacks the statutory or delegated authority to take such action.

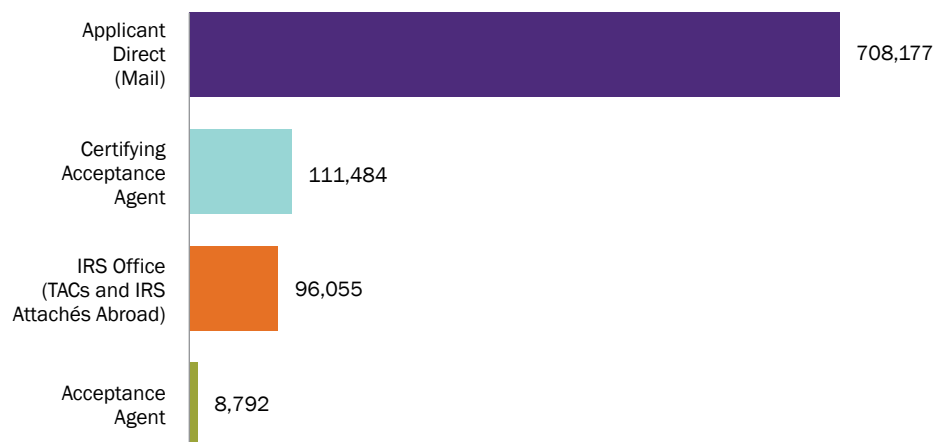
36 During 2015, another 66 OARs asked for assistance locating and returning missing passports, but did not specify expedited mail service. Cases were identified by the primary issue code "Form W-7/ITIN/ATIN" and by an analysis of the recommended actions in each case.

- Close on a home with the requirement of providing the passport.

A significant majority of applicants mail in their ITIN applications as shown in the chart below.

FIGURE 3.11.1³⁷

Submission Sources for the Number of ITIN Applications in CY 2014



Applicants Abroad Have More Limited Options for Applying for ITINs

For applicants outside the United States, the 2016 Act provides further restrictions by ending their use of CAAs.³⁸ In 2014, approximately 70,200 ITIN applications were filed from abroad.³⁹ Although applicants abroad may still apply to an IRS employee under the new law, this option has been effectively taken off the table because during late 2014 and 2015 the IRS eliminated the last four tax attaché posts abroad,⁴⁰ and the IRS has not identified other IRS offices abroad where an ITIN applicant can apply. The legislation has codified the IRS's policy allowing certification of foreign documents by U.S. consular or diplomatic posts and expanded it so applicants can now apply in person at a U.S. diplomatic

37 IRS, CDW Form W-7 Database (Mar. 22, 2016). Detailed information from ITIN applications (Form W-7) for PY 2015 are not reported here due to a programming error that caused only about half of Form W-7 records being transferred to the IRS's CDW from the ITIN RTS. The IRS informed TAS that the corrected data for 2015 would not be available until early/mid 2016 and suggested that TAS exclude characteristics of 2015 Form W-7 applicants from this report. Form W-7 data for PY 2014 and prior years have been corrected. As discussed below, applying at an IRS attaché is no longer an option following the closure of the last one in late 2015.

38 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(1)(B)); see also § 203(c).

39 This number represents 7.6 percent of all ITIN applications submitted during 2014. Applications were considered to be filed from abroad if the applicant's mailing address listed on line 2 of Form W-7 included a country code that was not "U.S." or a U.S. territory.

40 See Memorandum from Acting Deputy Commissioner, Large Business and International (LB&I), Post Closures of Frankfurt, London and Paris (Feb. 18, 2015). Although the exact number of ITIN applications received at the attachés is unknown, in 2014, the London attaché reported 4,379 issues related to ITINs. See IRS response to TAS information request (July 22, 2015).

or consular post.⁴¹ To our knowledge, the IRS has not provided any information to the public regarding which diplomatic or consular posts can now receive ITIN applications, in addition to just certifying the supporting documentation. The Texas Society of Certified Public Accountants recently expressed its concerns to the Commissioner of Internal Revenue that only few consular or diplomatic posts can process ITINs.⁴² Furthermore, the IRS has not updated its internal guidance to reflect whether a U.S. diplomatic or consular office abroad may certify U.S. documents in addition to foreign documents, which would fill a vital need for applicants with U.S. documents who previously relied on CAAs.⁴³ As of June 10, 2016, the IRS's web pages "Obtaining an ITIN from Abroad"⁴⁴ and "Acceptance Agent Program"⁴⁵ failed to even inform taxpayers abroad that using a CAA is no longer an option for them.⁴⁶

The Law Allows the IRS Flexibility to Determine What Constitutes a Certified Copy for ITIN Applications and Who Can Certify Documents, But the IRS Has Not Used This Opportunity to Provide Additional Guidance

Under the 2016 Act, the IRS may only accept original documents or "certified copies meeting the requirements of the Secretary."⁴⁷ The IRS continues to require original documents, copies certified by the issuing agency, or copies certified by a CAA for most applicants.⁴⁸ However, the IRS has not provided updated information to TAS or on its public website regarding dependents of U.S. military personnel and certain applicants not required to apply with a tax return, who were both exempt from the requirement to provide original documents or copies certified by the issuing agency.⁴⁹ The current IRS Instructions for Form W-7, *Application for IRS Individual Taxpayer Identification Number*,⁵⁰ and the IRM⁵¹ both provide that these applicants may still submit notarized copies, which appears to run contra to the 2016 Act.

Furthermore, under the IRS's current procedures, Student and Exchange Visitor Program approved institutions can certify documents under a special procedure available only to students and only if the students submit an ITIN application without a tax return.⁵² Because the 2016 Act specifically includes colleges and universities in the list of persons eligible to be CAAs,⁵³ it is unclear whether the IRS will encourage these institutions to become CAAs in place of the current Student Exchange Visitor's Information System procedure. There will continue to be confusion among ITIN applicants and CAAs until the IRS provides clear guidance as to what constitutes a "certified copy" under the 2016 Act.

41 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(1)(B)). Prior to the legislation, U.S. diplomatic or consular posts could certify supporting documentation, but the applicant still had to send in the application to the IRS him or herself. See IRM 3.21.263.5.3.4.2.1, *Supporting Identification Documentation Certification Requirements* (Nov. 3, 2015).

42 See Letter from Kenneth M. Horwitz, Chair, Federal Tax Policy Committee, Texas Society of Certified Public Accountants, to John Koskinen, Commissioner of Internal Revenue (Apr. 5, 2016) (on file with TAS).

43 See IRM 3.21.263.5.3.4.2.1, *Supporting Identification Documentation Certification Requirements* (May 25, 2016).

44 IRS, *Obtaining an ITIN From Abroad*, <https://www.irs.gov/Individuals/International-Taxpayers/Obtaining-an-ITIN-from-Abroad> (last updated Dec. 2, 2015).

45 IRS, *Acceptance Agent Program*, <https://www.irs.gov/Individuals/Acceptance-Agent-Program> (last updated Mar. 3, 2016).

46 As discussed above, the Technical Corrections Act of 2016 would amend the Code to allow ITIN applicants abroad to use CAAs. See footnote 14, *supra*.

47 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(2)(B)).

48 See IRS Instructions for Form W-7, *Application for IRS Individual Taxpayer Identification Number* (Dec. 2014).

49 *Id.*

50 *Id.*

51 See IRM 3.21.263.5.3.4.2.1, *Supporting Identification Documentation Certification Requirements* (May 25, 2016).

52 See IRM 3.21.263.5.3.5.2, *Reason for Applying* (May 25, 2016).

53 See 2016 Act, § 203(c)(2).

The IRS's Plans for Deactivating ITINs May Lead to Applicants Not Receiving Adequate Notice Prior to Deactivation, and to Deactivated ITINs That Are Still Being Used on Third-Party Information Returns

The 2016 Act codifies a plan for deactivating ITINs after a period of nonuse.⁵⁴ Under the law, all ITINs issued after 2012 will remain in effect unless the ITIN holder does not file a tax return with the ITIN or is not included on another's return as a dependent for a period of three consecutive taxable years.⁵⁵ The IRS is required to deactivate these ITINs on the last day of the third consecutive year.⁵⁶ ITINs issued before 2013 will expire at the earlier of:

- After a period of three consecutive years of nonuse (defined above), with the first deactivations required to have begun the last day of 2015;⁵⁷
- Or on a staggered schedule from 2017 to 2020, whichever comes first.⁵⁸

The Law Requires the IRS to Deactivate a Substantial Number of ITINs in the Coming Years

TAS estimates there have been 23.1 million distinct ITINs issued since the IRS started issuing ITINs in 1996,⁵⁹ and an average of 10.3 million ITINs were used on a return annually from 2011 through 2015.⁶⁰

Although these numbers suggest a sizeable portion of ITINs are still being actively used, the law requires the IRS to deactivate the vast majority of ITINs between now and the beginning of 2020. Of the 23.1 million total ITINs issued, approximately 21.2 million (92 percent) were issued prior to 2013, meaning they are required to be deactivated regardless of current use.⁶¹ Furthermore, over half of the ITINs issued prior to 2013 were not used on a return during 2013, 2014, or 2015, requiring them to have been deactivated on the last day of 2015, according to the 2016 Act.⁶²

54 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)).

55 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)(A)).

56 *Id.* The Technical Corrections Act of 2016 would change this so that ITINs issued after 2012 would not be deactivated until the day after the due date for the tax return for the third consecutive taxable year of nonuse ending after the issuance of the ITIN. S. 2775, 114th Cong. § 2(e)(2)(A) (2016); H.R. 4891, 114th Cong. § 2(e)(2)(A) (2016).

57 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)(B)). For ITINs issued before January 1, 2013, that were not used at all during a period of three consecutive years, the statute requires them to be deactivated at the earlier of the last day of the year of the third consecutive year of nonuse, or the last day of 2015. The Technical Corrections Act of 2016 would change this so that ITINs issued prior to 2013 would not be deactivated until the day after the due date for the tax return for the third consecutive taxable year of nonuse, and one of the three consecutive taxable years of nonuse must be 2015 or later. Thus, the first deactivations would not be required until the day after the due date for the 2015 tax return. S. 2775, 114th Cong. § 2(e)(2)(B) (2016); H.R. 4891, 114th Cong. § 2(e)(2)(B) (2016).

58 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)(B)).

59 IRS, CDW, IRTF (Mar. 31, 2016). The IRS estimated in 2014 that it had issued 21 million ITINs since 1996, but that only about a quarter of them were being used on returns. IRS, *Unused ITINs to Expire After Five Years; New Uniform Policy Eases Burden on Taxpayers, Protects ITIN Integrity*, IR 2014-76 (June 30, 2014), <https://www.irs.gov/uac/newsroom/unused-itins-to-expire-after-five-years-new-uniform-policy-eases-burden-on-taxpayers-protects-itin-integrity> (last updated May 13, 2016).

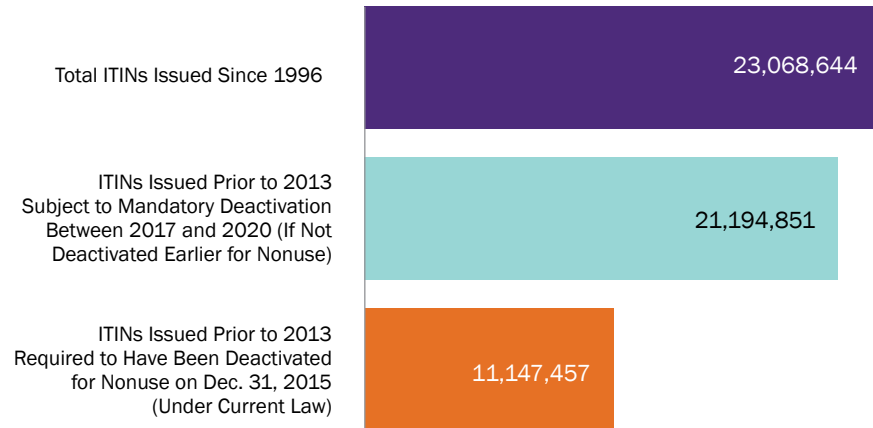
60 IRS, CDW, IRTF (Mar. 30, 2016).

61 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)(B)). ITINs issued prior to 2013 not otherwise deactivated for nonuse will be deactivated on a staggered schedule between 2017 and 2020.

62 See footnote 57, *supra*.

FIGURE 3.11.2⁶³

Estimated Numbers of Total ITINs Issued and ITINs Subject to Deactivation Under the 2016 Act



The Deactivation Provisions of the Law Create Challenges for the IRS

The IRS recently shared with TAS its concerns regarding the deactivation timeline established by the 2016 Act and the practical barriers to achieving the deadlines, such as the information technology restrictions and workload constraints regarding deactivating a large number of ITINs all at once.⁶⁴ Currently, the IRS has not systemically deactivated any ITINs following the passage of the 2016 Act.⁶⁵ One concern identified by the IRS is how an ITIN holder would know that his or her ITIN was issued in a certain year, such that they would know when it would be deactivated.⁶⁶ TAS understands the IRS is evaluating the feasibility of deactivating ITINs in phases. One potential option is to deactivate groups of ITINs based on the middle two digits of the ITIN, which are correlated with the year issued.⁶⁷ Such an approach, if feasible, would provide clarity to ITIN holders so long as they are sufficiently notified in advance of the deactivations.

63 IRS, CDW, IRTF, and Form W-7 (Mar. 30, 2016). ITINs issued prior to 2013 required to have been deactivated for nonuse on December 31, 2015 were determined as such based on their not being used on a Form 1040 series return at any point during 2013, 2014, or 2015. Because CDW is missing some data, TAS suspects this number may be higher. See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)).

64 Conference call between W&I and TAS (June 9, 2016).

65 IRS response to TAS information request (June 10, 2016).

66 Conference call between W&I and TAS (June 9, 2016).

67 For example, the IRS could publicize that it would be deactivating all ITINs with the two middle digits between XX and XX on a certain date.

Plans for Notifying ITIN Holders of Deactivations and Procedures for Reactivating ITINs Must Consider Taxpayer Needs

Even if the IRS is not able to begin the deactivations immediately, there is an opportunity to begin notifying applicants in advance of the deactivations so they can apply to reactivate their ITINs now, as opposed to during the filing season. The IRS has stated it is working with the Office of Taxpayer Correspondence to notify taxpayers in writing of the upcoming deactivations by late August 2016.⁶⁸ The National Taxpayer Advocate is pleased the IRS plans to notify ITIN holders in advance and urges the IRS to allow these holders to reapply during the same time period, prior to the filing season. If such a process were successful, the IRS could extend lessons learned to enable all ITIN applicants (not just those applying for reactivation) to apply for an ITIN outside the filing season without a tax return so long as they provide other proof of a tax administration purpose.

The National Taxpayer Advocate hopes the IRS will collaborate with TAS as it develops such a process to ensure potential issues are discovered upfront. For example, if the IRS allows taxpayers to apply to reactivate their ITINs during the summer, but the ITINs will not be reactivated until the next calendar year, there may be taxpayers who have since moved, creating risks of identity theft and fraud if an ITIN number is mailed to an address where the taxpayer no longer resides. An alternative approach would be to delay the deactivation program until a point at which taxpayers could apply for reactivation and receive their reactivated ITIN at the same time, both in advance of the filing season.

Guidance is needed regarding whether the IRS will treat a return filed with a deactivated ITIN in the same manner as it treats a return filed with a rejected ITIN application. Under the IRS's current policy, if a primary taxpayer's ITIN application is rejected, the attached return will be sent for processing under an Internal Revenue Service Number (IRSN), which does not allow a refund to be paid to the taxpayer.⁶⁹ If a dependent's ITIN application is rejected, the attached return goes forward for processing but the dependents are systematically disallowed via math error authority.⁷⁰

To date the IRS has not communicated any plans to provide special reapplication procedures for ITIN holders whose ITINs were deactivated, such that they would not have to go through the entire application process again, including submitting original or certified copies of documents.⁷¹ Based on evidence that over ten million of the ITINs issued prior to 2013 were used on a return during 2013-2015, a significant number of ITIN holders subject to the automatic deactivation are likely to apply to reactivate their ITINs.⁷² Past problems with timely and correctly processing ITIN applications as well as handling and returning original documents are likely to grow exponentially worse as the volume of applicants increases.⁷³

68 IRS response to TAS information request (June 10, 2016).

69 See IRM 3.21.263.4.5, *Internal Revenue Service Number (IRSN)* (Jan. 1, 2015).

70 *Id.* The IRS is currently authorized to correct mathematical or clerical errors — arithmetic mistakes and the like — and assess any tax increase using summary assessment procedures that do not provide the taxpayer an opportunity to challenge the proposed deficiency in the United States Tax Court before the tax is assessed. See IRC §§ 6213(b)(1),(g)(2).

71 IRM 21.8.1.1.21, *IRS Individual Taxpayer Identification Number (ITIN)* (Jan. 19, 2016) states that once an ITIN has been deactivated, a taxpayer will have to reapply using IRS Form W-7, *Application for IRS Individual Taxpayer Identification Number*.

72 There were 21,194,851 ITINs issued prior to CY 2013. Of these, 10,047,394 ITINs were used on a Form 1040 on or after CY 2013 by either a primary, secondary, or dependent filer. CDW, IRTF and Form W-7 (Mar. 30, 2016).

73 See National Taxpayer Advocate 2015 Annual Report to Congress 196-212 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers*).

Also of major concern is the law's expansion of the IRS's math error authority to situations where a taxpayer lists on a return an ITIN that has been deactivated, revoked, or otherwise invalid.⁷⁴ Taxpayers unaware that their ITINs have expired may not find out until they file a return with the deactivated ITIN and receive a math error notice, depending on whether and how the IRS decides to notify taxpayers about the deactivation. A taxpayer whose ITIN was deactivated in error and was denied credits to which he or she is entitled will lose the opportunity to challenge eligibility for the credits in the U.S. Tax Court if he or she does not respond timely to the math error notice. This procedure may deprive low income or overseas taxpayers, in particular, of fundamental due process protections.

ITIN Holders May Face Problems If Their ITINs Are Issued Solely for Tax Treaty Purposes

Related to deactivation, the 2016 Act also requires the IRS to distinguish ITINs issued solely for tax treaty purposes and ensure that they are only used for such purposes.⁷⁵ Some taxpayers may not realize their ITINs are only good for tax treaty purposes and not discover they need to apply for another ITIN until after filing a return. To TAS's knowledge, the IRS has not notified the public of this new restriction. TAS is unaware if the IRS has made a determination as to whether ITIN holders who need an ITIN for reasons other than tax treaty purposes will be required to go through the entire ITIN application process again, including again providing original or certified copies of supporting documents. To respect a taxpayer's *right to be informed*, upon issuing ITINs solely for tax treaty purposes, the IRS should notify taxpayers that their ITINs cannot be used for any other purposes and inform them of the steps they must take to obtain an ITIN that will be used for other tax-related purposes. Furthermore, where the applicant has already gone through the full ITIN application process (including providing original or certified copies of documents), the IRS should provide an abbreviated and expedited procedure for applying for a new ITIN that can be used for other purposes, so long as the applicant provides proof of a filing requirement.

IRS Guidance Is Needed Regarding ITINs Actively Being Used on Third-Party Information Returns

A major shortcoming of the legislation's deactivation provision is the requirement to deactivate an ITIN unless "the individual to whom such number is issued does not file a return of tax (or is not included as a dependent on the return of tax of another taxpayer) for three consecutive taxable years," which can be interpreted to require deactivation even if the ITIN is being actively used on a return filed by a third party.⁷⁶ Of the 11.1 million ITINs not used on a Form 1040 series return during 2013, 2014, or 2015, over 400,000 were used on one of three common information returns filed by third parties — Form 1099-INT, Form 1099-MISC, or Form 1099-DIV.⁷⁷ Even more ITINs may have been used on other information returns, such as Form 8966, *FATCA Report*,⁷⁸ but data for this form was not available on the IRS's CDW.

TAS understands the IRS may choose to interpret this requirement as only deactivating the ITIN for the purpose of filing a Form 1040 series return. Under such a policy, the ITIN would remain active for the purposes of information returns and a reporting agent would not be penalized for including a deactivated ITIN on an information return. If the IRS adopts such a policy, it is incumbent upon the IRS to

74 See 2016 Act, § 203(e) (codified at IRC § 6213(g)(2)(O)). For a description of math error authority, see footnote 70, *supra*.

75 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(4)).

76 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)).

77 IRS, CDW, IRTF, Information Returns Master File (IRMF), and Form W-7 (Mar. 31, 2016).

78 IRS Form 8966, *FATCA Report* (2015). See Foreign Account Tax Compliance Act (FATCA), Pub. L. No. 111-147, Title V, Subtitle A, 124 Stat. 71, 97 (2010).

communicate this information as soon as possible to persons filing information returns, who currently have no way of knowing whether an ITIN has been deactivated and no reassurance that they will not be penalized for filing an information return with a deactivated ITIN or failing to withhold from such an account.⁷⁹ In addition to a formal notice, the IRS should also provide a briefing to the Information Reporting Program Advisory Committee (IRPAC)⁸⁰ to ensure reporting agents receive this information. Because of the increased reporting required for FATCA, receiving clarification from the IRS on how it will treat information returns filed with deactivated ITINs, including Form 8966, *FATCA Report*, will be vital.⁸¹

Even if the ITINs are only deactivated for the purposes of filing a Form 1040 series return, the legislation could still harm taxpayers whose ITINs are being actively used on information returns and who find themselves needing to file a Form 1040 series return after three years of not having filed one. The National Taxpayer Advocate encourages the IRS to pursue a legal opinion from its Office of Chief Counsel to determine whether the ITINs from persons who have had reportable income within the relevant three year period, but who did not file a return, would still be required to be deactivated under the 2016 Act.⁸²

Lengthy Processing Times May Lead to Applicants Not Being Able to Receive Tax Credits to Which They Are Otherwise Legally Entitled

Under the 2016 Act, the CTC and the AOTC are disallowed if the taxpayer's ITIN was issued after the due date for filing the tax return for the taxable year.⁸³ There is an exception for timely filed 2015 tax year returns,⁸⁴ but the IRS did not provide any notice to ITIN applicants during the recent filing season about the need to file on time. Congress introduced legislation that would remove the exception for timely filed 2015 returns, but did so only days before the end of the filing season.⁸⁵

IRS Guidance Is Needed Regarding the Requirement for an ITIN to Be Issued Prior to the Tax Return Due Date for Applicants to Receive the CTC and the AOTC

The IRS has not communicated to the public how it will interpret the tax return filing due date for the purpose of sections 205 and 206 of the 2016 Act. Although TAS understands that the tax return due date will include applicable extensions, applicants may not know they need to request an extension to file because they plan on filing their returns and associated ITIN applications before the tax return due date

79 See Oral Statement of Cheryl Reidlinger, National Taxpayer Advocate Public Forum 84 (Apr. 4, 2016).

80 "The purpose of the IRPAC is to provide an organized public forum for discussion of relevant information reporting issues of mutual concern as between Internal Revenue Service ("IRS") officials and representatives of the public." IRS, *Information Reporting Program Advisory Committee (IRPAC) Facts*, <https://www.irs.gov/tax-professionals/information-reporting-program-advisory-committee-irpac-facts> (last updated Apr. 24, 2016).

81 See IRS Form 8966, *FATCA Report* (2015). Under FATCA, participating foreign financial institutions (FFIs) who have reached agreements with the IRS to avoid being subject to systematic withholding must impose withholding on any of their own customers defined as "recalcitrant account holders." IRC § 1471(b)(1)(D)(i). See IRC § 1471(d)(6) (definition of "recalcitrant account holder"). Financial customers must provide the FFI with either a Form W-9, to certify they are U.S. persons, or a Form W-8BEN, to certify they are foreign persons, both of which require an SSN or ITIN. Taxpayers without an SSN or ITIN will generally be treated as recalcitrant account holders and will be subject to withholding undertaken by the FFI. See generally Treas. Reg. § 1.1471-4.

82 See 2016 Act, § 203(a) (codified at IRC § 6109(i)(3)).

83 2016 Act §§ 205 (codified at IRC § 24(e)), 206 (codified at IRC § 25A(i)(6)).

84 *Id.*

85 See S. 2775, 114th Cong. § 2(g)(2)(A) (2016); H.R. 4891, 114th Cong. § 2(g)(2)(A) (2016). Both bills were introduced on Apr. 11, 2016.

and assume that the ITIN will be processed by this date.⁸⁶ To encourage applicants to request an extension, the IRS should further evaluate whether it can place a box on the ITIN application where checking the box would be deemed a request for extension. Another potential solution would be to deem an ITIN processed on the date the ITIN application and accompanying proof of tax administration purpose are received. The National Taxpayer Advocate encourages the IRS to seriously explore this possibility and if it proceeds in this way, to issue guidance to the public so that applicants understand the importance of applying before the tax return due date. Without such a policy of deeming ITINs processed when the applications are received, there will likely be problems processing ITINs in time.

Processing Delays and Late Filed ITIN Applications May Prevent Taxpayers From Receiving the CTC or AOTC

Even if the IRS interprets the filing due date as October 15, the date by which taxpayers may receive an extension to file, there will likely be applicants whose ITINs will not be processed in time, and thus would be barred from receiving the CTC and the AOTC for the year in which they apply for an ITIN. During the 2016 filing season, applicants were advised to wait up to 11 weeks for the ITIN applications to be processed.⁸⁷ There may also be applicants whose applications are suspended for lengthy periods of time and who are unable to gather new, original documents and reapply in time for an ITIN to be issued by the due date.

The lengthy periods for processing ITIN applications and resolving suspended applications are attributable at least in part to the IRS's requirements that most ITIN applications be filed with a paper tax return during the filing season.⁸⁸ While the National Taxpayer Advocate recommended since 2003 that the IRS accept ITIN applications throughout the year with proof of a valid tax filing requirement, to date the IRS has failed to adopt this approach.⁸⁹ The resulting delays may lead to applicants not being able to receive tax credits to which they are otherwise legally entitled.

The following charts show that a significant number of ITIN applicants apply after the due date for filing a return, and many ITINs are assigned after this date as well.

⁸⁶ Taxpayers do not need an SSN or ITIN to file for an extension, but they must file Form 4868 by the due date of the return. See IRS Form 4868, *Application for Automatic Extension of Time To File U.S. Individual Income Tax Return* (2015).

⁸⁷ See IRM 3.21.263.6.1.28, *Steps to Complete Client Contact* (Jan. 1, 2016).

⁸⁸ See National Taxpayer Advocate 2015 Annual Report to Congress 196-212 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes Create Barriers to Filing and Paying for Taxpayers Who Cannot Obtain Social Security Numbers*).

⁸⁹ See National Taxpayer Advocate 2003 Annual Report to Congress 60-86 (Most Serious Problem: *Individual Taxpayer Identification Number (ITIN) Program and Application Process*); Taxpayer Advocate Directive 2009-1 (*Processing of Forms W-7/ Filing of ITIN Applications and Associated Tax Returns*) (Feb. 25, 2009). Taxpayer Advocate Directives mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers or all taxpayers. See IRM 1.2.50.4, *Delegation Order 13-3 (formerly DO-250, Rev. 1), Authority to Issue Taxpayer Advocate Directives* (Jan. 17, 2001).

FIGURE 3.11.3⁹⁰

ITIN Applications Received Weekly in 2015

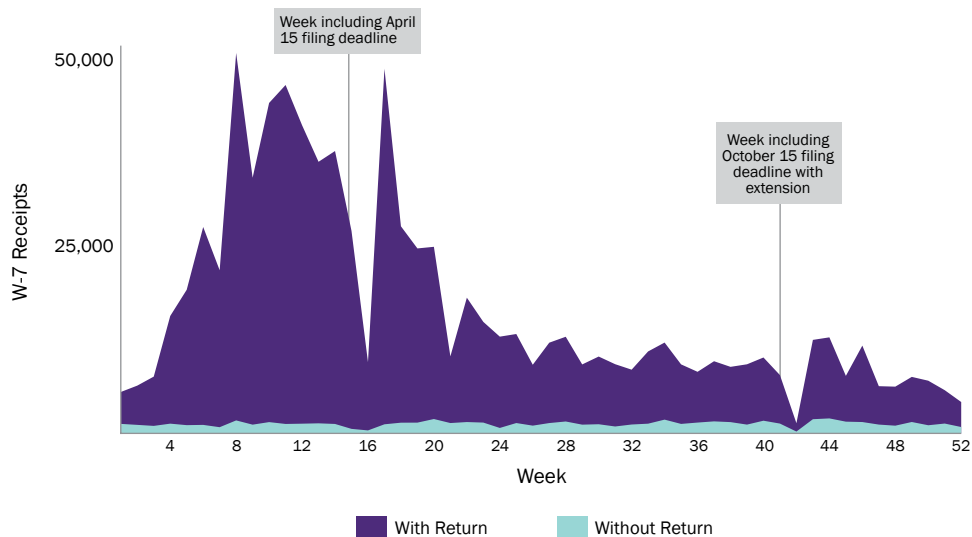
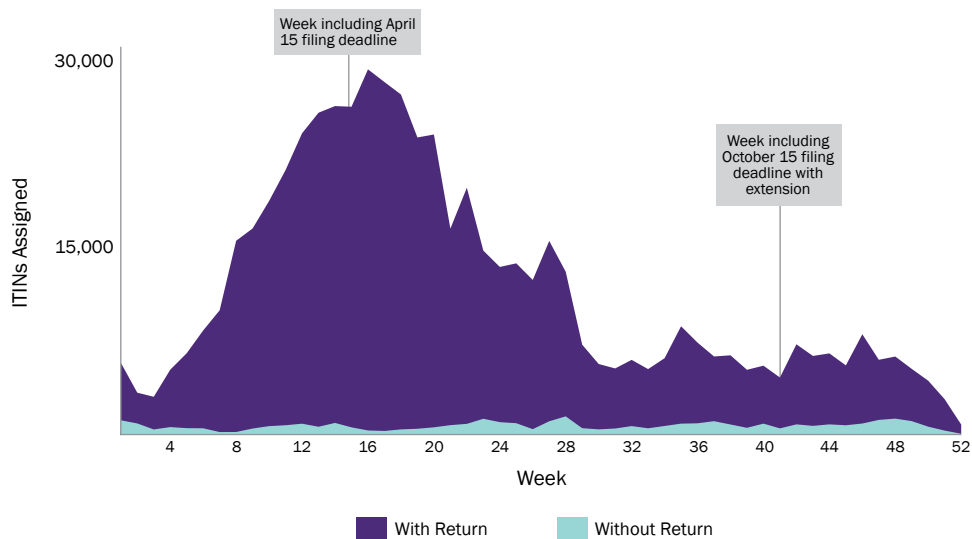


FIGURE 3.11.4⁹¹

ITINs Assigned Weekly in 2015



90 Compiled from weekly 2015 ITIN Comparative Reports, Jan. 10, 2015 through Dec. 30, 2015.

91 *Id.*

Applicants who do not know that their ITINs will be deactivated may not find out until during or after the filing season, leaving them without enough time to apply for a new ITIN and for that ITIN to be issued by the due date. Such applicants may miss out on tax benefits to which they would otherwise be legally entitled; that is, IRS procedures as presently structured violate these taxpayers' *right to pay no more than the correct amount of tax*.

The IRS Study on ITINs Presents an Opportunity for Better Understanding of ITIN Applicants and the Application Process

The 2016 Act requires the IRS to conduct a study on the effectiveness of the application process for ITINs before the implementation of the relevant amendments.⁹² This study shall include (among a list of more detailed items):

- The effects of the amendments on the application process;
- The comparative effectiveness of an in-person review versus other methods of reducing fraud and improper payments; and
- Possible administrative and legislative recommendations to improve the process.

The report from the study must be submitted to Congress within one year, and any administrative steps identified shall be implemented within 180 days of submitting the report. If the report supports using an in-person initial review of ITIN applications to reduce and deter fraud, the IRS must outline the steps to achieve this, in conjunction with an expansion of the CAA program, with the goal of transitioning to such a program by 2020.⁹³

The National Taxpayer Advocate has requested that TAS be included on the team working on this study, but to date the IRS has not included TAS employees. To ensure a comprehensive, balanced and unbiased approach, TAS plans to conduct its own study of ITIN applicants and the application process during the coming fiscal year with the goal of identifying recommendations to reduce fraud and improper payments, protect taxpayer rights, and make it less burdensome for taxpayers to comply with their filing obligations. TAS will publish and submit this report to Congress as part of one of the National Taxpayer Advocate's upcoming Annual Reports to Congress.

The vast number of unanswered questions and the lack of guidance are a cause for great concern, given the number of ITIN applications received each year, as well as the number of ITINs that will be required to be deactivated in the coming years. The IRS has an opportunity to make some significant improvements to the ITIN program in response to the 2016 Act. However, by failing to involve TAS in the planning and not providing information to the public, there is potential for taxpayers needing ITINs to face increased compliance burden and harm.

92 2016 Act, § 203(d).

93 *Id.*

FOCUS FOR FISCAL YEAR 2017

In Fiscal Year 2017, TAS will continue to:

- Monitor changes to the ITIN application procedures and make recommendations for changes to reduce fraud and improper payments, protect taxpayer rights, and facilitate taxpayers in meeting their tax filing and payment obligations;
- Insist on participation on IRS teams to ensure taxpayers' perspectives and needs are taken into account as the IRS makes changes to ITIN application procedures;
- Conduct a study analyzing the composition, application characteristics, and needs of the ITIN applicant population, and provide data-driven recommendations for reducing fraud and improper payments, as well as reducing taxpayer burden and promoting taxpayer rights during the ITIN application process; and
- Advocate for the IRS to allow ITIN applications throughout the year with the proof of a legitimate tax return filing requirement.