

**MSP
#14****COLLECTION DUE PROCESS HEARINGS: Current Procedures Allow Undue Deference to the Collection Function and Do Not Provide the Taxpayer a Fair and Impartial Hearing****RESPONSIBLE OFFICIALS**

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DEFINITION OF PROBLEM

The IRS's current procedures for Collection Due Process (CDP) hearings do not always result in a fair, impartial, and independent review. The IRS Restructuring and Reform Action of 1998 (RRA 98) established a taxpayer's right to an independent review of IRS lien and levy actions by the Office of Appeals, known as a CDP hearing.¹ Unlike other creditors, the IRS can file a lien against or levy a taxpayer's assets without first obtaining a court order. Providing due process rights for collection actions forces the IRS to consider the taxpayer's circumstances before (or immediately after, in the case of lien filing) exercising these powers.²

As conducted by the IRS today, CDP hearings do not provide most taxpayers with a meaningful hearing. In many cases, the IRS issues a CDP notice before making any other contact with the taxpayer and before he or she has a chance to meaningfully engage with Collection. As a result, taxpayers may feel pressured into requesting a CDP hearing, and Appeals may receive cases that are not fully developed. When Collection receives a CDP request, it has discretion as to when to send the case to Appeals. In situations where the taxpayer works with Collection and does reach an agreement, Collection will ask the taxpayer to withdraw the CDP request, taking away his or her opportunity for an independent review.

One of the most significant problems with CDP hearings is that Appeals may not give proper attention to a core taxpayer rights aspect of the hearing, namely, the balancing test that requires the Hearing Officer to weigh the need for collection against the taxpayer's interest that the action be no more intrusive than necessary.³ Moreover, Hearing Officers do not exercise settlement authority used by other Appeals Officers and thus may not fully carry out the balancing test.

1 See IRC § 6330(b). See also Pub. L. No. 105-206, § 3401. A lien is "a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied." *Black's Law Dictionary* (9th ed. 2009). See also IRC § 6321. Levy refers to the IRS's ability to collect amounts owed by taking the property or rights to the property of the taxpayer. See IRC § 6331.

2 The taxpayer must file a CDP request within 30 days of receiving the CDP notice. The IRS sends the CDP notice within five days of the filing of the lien or the Notice of Intent to Levy. IRC §§ 6330(b)(1) and 6330(b)(3). In limited circumstances described in IRC § 6330(f) the taxpayer does not have CDP rights until after the levy.

3 "Hearing Officer" describes "a group of employees who deal with taxpayers and resolve disputes. An Appeals hearing officer is any Settlement Officer, Appeals Officer, Appeals Account Resolution Specialist or other employee holding hearings, conferences or who otherwise resolves open case issues in Appeals." IRS, AJAC FAQs, <http://appeals.web.irs.gov/about/ajac-faq.htm> (updated Sept. 30, 2013).

ANALYSIS OF PROBLEM

RRA 98 established a taxpayer's right to a CDP hearing to give taxpayers who are dealing with the IRS the same protections they have when dealing with other creditors.⁴ Congressional testimony explained, "Many people were shocked to learn that a number of the due process protections Americans take for granted in other legal proceedings do not apply to actions involving the IRS."⁵ As a result, Congress sought increased protection for taxpayers.⁶ The Senate committee report emphasized, "a proposed collection action should not be approved solely because the IRS shows that it has followed appropriate procedures."⁷

CDP hearings have three major elements:

1. To provide an independent review of IRS collection action by an Appeals employee;
2. To verify that Collection has followed any applicable law or administrative procedure; and
3. To ensure "any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary."⁸

During a CDP hearing, a taxpayer may raise appropriate spousal defenses, challenge the appropriateness of the collection actions, and offer collection alternatives.⁹ A taxpayer can challenge the underlying liability if he or she did not receive a statutory notice of deficiency or otherwise have an opportunity to dispute the tax liability.¹⁰

Of the taxpayers who receive CDP notices, few request CDP hearings. In FY 2012, the IRS issued over 3.6 million CDP notices and received only about 47,500 CDP hearing requests, approximately 1.31 percent of hearings offered.¹¹ CDP cases represented 37.9 percent of Appeals receipts in 2012 and 35.9 percent through June 30, 2013, the largest single receipt source.¹²

4 S. REP. No. 105-174, at 68 (1998).

5 144 CONG. REC. 4,190 (1998).

6 144 CONG. REC. 4,184 (1998). "Currently there is a woeful lack of protection in this area, particularly during collection activity, where the IRS is the judge and jury, and where some agency employees take a cavalier approach to issuing a notice of lien, levy, or seizure of a taxpayer's home, personal belongings, or business property."

7 S. REP. No. 105-174, at 68 (1998).

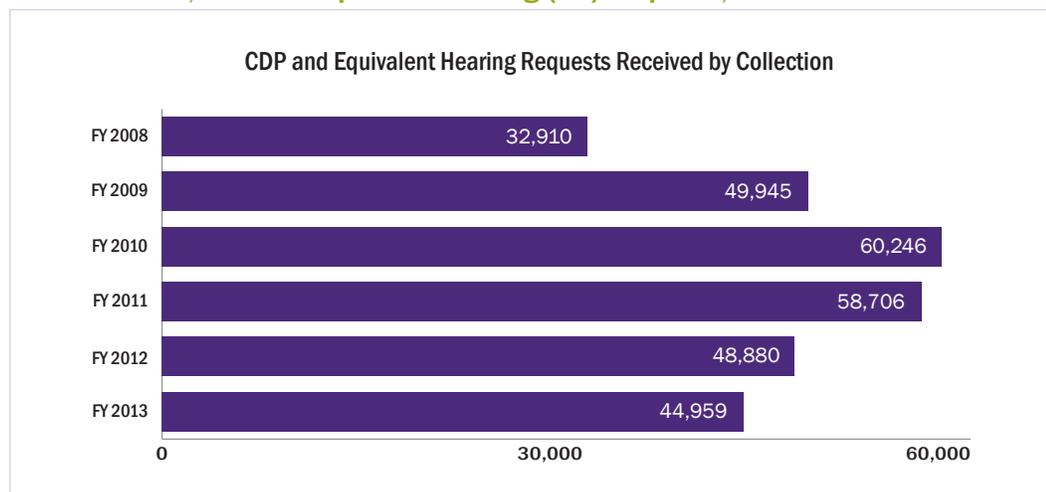
8 IRC § 6330(c).

9 IRC § 6330(c)(2)(A).

10 IRC § 6330(c)(2)(B).

11 IRS response to TAS information request (Nov. 15, 2013). Fiscal year is based on when the CDP hearing was requested. In the first half of 2013, the IRS issued over 2.4 million CDP notices, but received only 35,780 CDP requests, approximately 1.48 percent.

12 IRS response to TAS information request (Sept. 17, 2013). Appeals receipts include other issues taxpayers commonly appeal, such as issues in examination. Compare to Examination/TEGE appeals, comprising 31.4 percent in fiscal year (FY) 2012 and 31.4 percent through June 30, 2013.

FIGURE 1.14.1, CDP and Equivalent Hearing (EH) Requests, Fiscal Years 2008–2013¹³

Taxpayers may not have the chance to work with Collection before receiving a CDP notice and may feel forced into a CDP hearing.

The IRS must issue a CDP notice within five days of filing a notice of federal tax lien (NFTL), and at least 30 days before it can levy with respect to the unpaid tax.¹⁴ Although the statute ties the timing of the CDP notice to the NFTL and notice of intent to levy (“NIL”), issuing the CDP notice too early undercuts the entire CDP process.¹⁵ In many cases, Collection employees do not attempt to contact the taxpayer before sending the CDP notice. The Internal Revenue Manual (IRM) requires employees to make reasonable efforts to contact the taxpayer (by visiting, calling, or mailing a notice to the last known address) before issuing the NFTL.¹⁶ However, the IRS undermines this protection by requiring the NFTL filing determination ten days after the initial contact attempt or when the contact was due (before any undeliverable mail would be returned and processed).¹⁷ For levies, there is no requirement that the IRS contact the taxpayer before issuing the NIL, which the IRS can issue as early as ten days after issuing the notice of assessment and demand for payment.¹⁸ Neither the Automated Collection System (ACS) nor Field Collection tracks how often employees contact taxpayers by phone or mail prior to sending CDP notices.¹⁹ Given that ACS employees only spend about two or three percent of their time on outbound calls, it is unlikely ACS contacts most taxpayers before issuing the CDP notice.²⁰ For Field Collection,

13 TAS Research Individual Master File transaction code 971 action code 275 or 278 (Nov. 17, 2013). Fiscal year is based on when the CDP notice was mailed to the taxpayer, as opposed to the date when the CDP hearing was requested, as used in the text above.

14 IRC §§ 6320(a)(2), 6330(a)(2). In limited situations, the IRS can levy before providing the right to a CDP hearing. IRC § 6330(f). IRC § 6320(a)(2) requires the IRS to issue a notice of the taxpayer’s right to a CDP hearing within five days of filing the notice of tax lien.

15 IRC § 6331(d)(2) requires the IRS to provide notice of intent to levy at least 30 days before the day of the levy, except where the collection of tax is in jeopardy.

16 IRM 5.12.2.2(1) (Oct 14, 2013). If the taxpayer does not send in a payment, the IRS must advise the taxpayer of his or her right to appeal under the Collection Appeals Program, which is the only pre-lien administrative appeal process. It is limited to procedural arguments. See IRM 5.12.6.4(2) (Oct. 14, 2013).

17 IRM 5.12.2.3.2(1) (Oct 14, 2013).

18 See IRM 5.11.1 (Feb. 3, 2012). The IRS usually issues the Notice of Intent to Levy and Notice of Your Right to a Hearing (L1058) on initial contact with a business taxpayer or combination business/individual taxpayer when a deadline is set for the taxpayer to take specific action. For individual taxpayers, the IRM advises using discretion as to whether to issue the L1058 on initial contact. IRM 5.11.1.2.2 (Dec. 11, 2009).

19 IRS Response to TAS Information Request (Sept. 3, 2013).

20 Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2010-30-046, *More Management Information is Needed to Improve Oversight of Automated Collection System Outbound Calls* 3 (Apr. 28, 2010).

Revenue Officers (ROs) issue the CDP notice at the same time as the initial contact when the RO asks for the financial analysis.²¹

A taxpayer has only 30 days to file a CDP request after receiving a CDP notice, and may feel pressured to request a hearing even if he or she is still putting together documentation and trying to work with Collection.²² If a taxpayer does not provide the requested information before Collection's deadline, it may deny the taxpayer's position as unsubstantiated and transfer the case file to Appeals without reviewing the documents later provided.²³ In some cases, ROs may perceive the filing of a CDP request as an action solely to delay collection and refer the taxpayer's representative to the Office of Professional Responsibility, despite the fact that filing a CDP request is a reasonable and legal action to take.²⁴

Taxpayers may sacrifice their rights if they come to an agreement with Collection after filing the CDP request.

A taxpayer who files a CDP request to preserve the right to a hearing may end up sacrificing this right if he or she reaches an agreement with Collection. If the taxpayer and the IRS come to a proposed settlement, the IRS asks the taxpayer to withdraw the CDP request.²⁵ While Collection has told TAS that a taxpayer is *not required* to withdraw a CDP request upon reaching a resolution, the IRM states "the RO should solicit a withdrawal of the hearing request."²⁶ If a taxpayer withdraws a CDP request, the taxpayer loses the opportunity for Appeals to verify independently that the IRS has followed the law and procedures and conduct the balancing test.²⁷

The IRS should change these procedures so that Appeals enters into the agreement with the taxpayer, meaning Appeals will still be required to make the CDP determination.²⁸ When a taxpayer reaches an agreement with Appeals, he or she must sign a form that waives the right to judicial review of Appeals' determination.²⁹ Under the current system, where a taxpayer signs an agreement with Collection, the result is the worst of both worlds – the taxpayer loses the opportunity for a future Appeals determination that is subject to judicial review, while at the same time giving up the current opportunity for Appeals to review Collection's actions and conduct the balancing test.

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- 21 "While the notices sent in the notice stream are sufficient for filing an NFTL, generally when an NFTL has not been previously filed the revenue officer's determination with respect to the filing of the NFTL will be done in conjunction with the initial actual contact or initial attempted contact." While it is preferable to contact the taxpayer in person, the initial contact can also be done by phone or by mailing a notice or letter to the last known address. IRM 5.12.2.2 (Oct. 14, 2013). See also IRM 5.1.30.2 (July 8, 2011), 5.1.30.3 (July 8, 2011), 5.1.30.5 (July 8, 2011).
- 22 IRC § 6330(a)(3); IRC § 6320(a)(3).
- 23 In some cases, a taxpayer may not receive the NIL or NFTL letter. In FY 2012, 33.9 percent of the NIL letters and 6.5 percent of the NFTL letters were unclaimed, refused, or undeliverable. TAS Research Individual Master File, ratio of taxpayers with transaction code 971 action code 67 or 68 to number of taxpayers with transaction code 971 action code 69. (Nov. 16, 2013). See IRM 5.12.6.3.17 (Oct. 14, 2013).
- 24 The Director of the IRS Office of Professional Responsibility (OPR) has warned practitioners that assisting with a CDP claim involving collection alternatives could lead to practitioner discipline if the taxpayer is not compliant with payment and filing obligations. See 137 Tax Notes 742 (Nov. 12, 2012).
- 25 IRM 5.1.9.3.4 (Feb. 23, 2012).
- 26 IRS response to TAS information request (Sept. 3, 2013). The regulations provide that withdrawal is allowed but not required. Treas. Reg. 301.6330-1(c), A-C9 provides that when a taxpayer resolves the matter with Collection after filing a CDP request, "the taxpayer *may* withdraw in writing the request that a CDP hearing be conducted by Appeals" (emphasis added). See IRM 5.1.9.3.3 (3) (Feb. 23, 2012).
- 27 IRM 8.22.5.2.5(5) (Nov. 8, 2013) states, "The Legal and Administrative review is not required when a taxpayer withdraws his/her hearing request," but the IRM is silent as to whether Appeals must conduct the balancing test. The taxpayer also loses the ability to challenge the underlying liability, if allowed in the CDP hearing. See IRC § 6330(c)(2)(B).
- 28 IRC § 6330(c)(3) provides that the CDP determination shall take into consideration: the verification that the law and applicable procedures were followed, any issues raised relating to the unpaid tax or the proposed levy allowed to be raised under IRC § 6330(b)(2), and the balancing test.
- 29 IRM 8.22.7.1.2 (Nov. 5, 2013). This is similar to what takes place when a taxpayer settles a case in Tax Court and must agree not to appeal the decision.

The process of requesting a hearing raises impartiality concerns.

A taxpayer who requests a CDP hearing may doubt whether the review will be independent because the taxpayer must send the request to Collection, the same office demanding payment.³⁰ Collection has discretion as to when to send the CDP case to Appeals, and can delay a hearing by not sending the case to Appeals for up to 90 days if it determines the taxpayer is willing to work with Collection.³¹ Collection can also send the case immediately if it determines the taxpayer does not want to work with collection or raises frivolous arguments.³² Thus, the timing of when Appeals receives a case comes with an implication that the taxpayer is a “good taxpayer” willing to work with Collection, or a “bad taxpayer” acting unreasonably. The Appeals Customer Satisfaction Survey reflects the disparity in the time it takes a case to reach Appeals, and found that taxpayers whose cases took 30 days or less to assign to an Appeals Officer were significantly less satisfied overall than those whose cases took longer.³³ Taxpayers may have been dissatisfied because they felt rushed into the Appeals proceedings without the opportunity to have their information and specific facts considered.³⁴ However, other Appeals customers who were dissatisfied with the amount of time it took to hear from Appeals thought Appeals should schedule an initial conference within 30 days of a request.³⁵

Current procedures may prevent taxpayers from effectively challenging the underlying liability.

Some taxpayers may disagree with the underlying liability even though they do not meet the statutory requirements for challenging it.³⁶ If eligible, taxpayers can raise the liability through other channels.³⁷ Currently, when a taxpayer raises liability issues such as Innocent Spouse, penalties, or interest abatement, or the taxpayer submits a Doubt as to Liability (DATL) OIC, Appeals assigns the case to an Appeals Officer or Settlement Officer for consideration.³⁸ If a taxpayer files an amended return or disputes an automated substitute for return (ASFR), the CDP hearing is suspended while

Unlike other creditors, the IRS can file a lien against or levy a taxpayer's assets without first obtaining a court order.

30 See IRS Form 12153 (Mar. 2012).

31 During the first three quarters of 2013, the average time from the filing of a CDP request to Appeals receiving the CDP case was 69 days. IRS Response to TAS Information Request (Sept. 5, 2013). See also IRM 5.1.9.3.3 (Feb. 23, 2012).

32 See IRM 5.1.9.3.3 (Feb. 23, 2012).

33 Appeals Customer Satisfaction Survey, National Report, Fiscal Year 2012 Results, Time to Hear from Appeals 9. Appeals Customer Satisfaction Survey, National Report, Fiscal Year 2012 Results, Overall Satisfaction by Time from Appeal Request to Case Assignment 15.

34 Two of the strongest drivers of satisfaction for Appeals customers were “Consideration of Information You Presented” and “Application of the Law to the Facts in Your Case.” *Id.* at 23.

35 This seemingly contradictory finding may be the result of some Appeals customers experiencing extreme wait times for their conferences to be scheduled. A recent TIGTA report found 58 CDP or Equivalent Hearing cases from a sample of 132 that exceeded the target time of 90 days to resolve or forward to Appeals. Twenty-nine of these cases took more than 180 days to resolve or forward to Appeals. See TIGTA, Ref. No. 2013-10-103, *The Office of Appeals Continues to Experience Difficulties in the Handling of Collection Due Process Cases 7* (Sept. 17, 2013). The sample was taken from 2011 and 2012. *Id.* at 31.

36 The taxpayer can contest a liability during a CDP hearing if he or she did not receive a notice of deficiency, never signed a consent for assessment, and did not have a prior opportunity to dispute the tax liability with Appeals. IRC § 6320(c) and IRC § 6330(c)(2)(B). A taxpayer may not have received a statutory notice of deficiency where the notice was undeliverable and the IRS had the taxpayer's last known address, but the IRS failed to send the notice the taxpayer's last known address.

37 These channels include audit reconsiderations, amended returns, and doubt as to liability (DATL) offer in compromise (OIC). A taxpayer is eligible for audit reconsideration if he or she meets four criteria: the taxpayer must have filed a tax return, the assessment must be unpaid or the IRS has reversed tax credits that the taxpayer is disputing, the taxpayer must identify which adjustments he/she is disputing, and the taxpayer must provide additional information not considered during the original examination. IRM 4.13.1.4 (Oct. 1, 2006). IRC § 7122 provides the authority to enter in OICs, including offers relating only to liability issues.

38 IRM 8.22.8.5.1 (Nov. 8, 2013).

the return is sent to Exam or the ASFR Reconsideration team.³⁹ As part of the Appeals Judicial Approach and Culture (AJAC) project, Appeals is considering which function should make the initial determination on DATL OICs settled by Appeals.⁴⁰ Compliance will determine whether to abate any of the liability, while the CDP hearing itself will remain in Appeals' jurisdiction.⁴¹ These forthcoming changes are positive if they allow Compliance to first consider the DATL offer (subject to the right to an administrative appeal of a rejection) and then allow Appeals to consider other issues as part of the CDP hearing. Unless the appropriate IRS function first resolves the liability issue, Appeals could end up sustaining a levy action even though resolving the liability may extinguish the levy entirely or qualify the taxpayer for a guaranteed or streamlined installment agreement (IA).⁴²

Another issue is that taxpayers cannot contest prior-year liabilities in CDP hearings. The regulations refer to a taxpayer's ability to contest liabilities "for any tax period shown on the CDP notice."⁴³ Appeals does not hear challenges to prior-year liabilities if they are not included on the CDP notice. This does not allow the taxpayer to resolve the collection matter in the most efficient way because most collection alternatives — IAs, OICs, and currently not collectible status — need to cover all years with a liability. One solution to this problem would be for Appeals to suspend the CDP hearing when non-CDP liability issues would be included in collection alternatives covered by the CDP hearing, to allow the taxpayer to resolve these related liability issues with the appropriate IRS function.

Taxpayers face roadblocks to receiving equivalent hearings.

If a taxpayer does not request a CDP hearing within the 30-day period, the taxpayer may still qualify for an equivalent hearing.⁴⁴ However, the IRS does not make it simple — the taxpayer will only receive an equivalent hearing if specifically requested.⁴⁵ Collection will not automatically process late-filed CDP requests as equivalent hearing requests.⁴⁶ Because equivalent hearings generally follow the same procedures as CDP hearings, taxpayers miss an important opportunity for Appeals to conduct the balancing test and review the collection action.⁴⁷

39 IRM 8.22.8.7.1.1 (Nov. 8, 2013). The National Taxpayer Advocate recommended a legislative change codifying the audit reconsideration process and providing, *inter alia*, that the Office of Appeals shall not issue a Notice of Determination in said case until such reconsideration and administrative appeal of the underlying liability have been concluded and the results are taken into consideration in making the CDP determination. National Taxpayer Advocate 2005 Annual Report to Congress 463.

40 The AJAC project has the goal of "enhancing internal and external customer perceptions of fair, impartial, and independent Office of Appeals." See Memorandum for Appeals Employees, Implementation of the Appeals Judicial Approach and Culture (AJAC) Project, Control No. Ap-08-0713-03 (July 18, 2013).

41 IRS, AJAC FAQs, Offers in Compromise Q6, http://appeals.web.irs.gov/about/ajac-faq.htm#Offers_in_Compromise (updated Nov. 17, 2013).

42 See IRM 5.19.1.5.4 (Oct. 18, 2013).

43 IRC § 6330(c)(2)(B) allows the taxpayer to raise at the CDP hearing "challenges to the existence or amount of the underlying tax liability for any tax period if the person did not receive any statutory notice of deficiency for such tax liability or did not otherwise have an opportunity to dispute such tax liability." Treas. Reg. 301.6330-1(e)(1) provides, "The taxpayer also may raise challenges to the existence or amount of the tax liability specified on the CDP Notice for any tax period shown on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute that tax liability." (emphasis added).

44 IRM 5.19.8.4.3 (Nov. 1, 2007).

45 A taxpayer can request an equivalent hearing by checking a box on Form 12153, *Request for Collection Due Process or Equivalent Hearing* (which the taxpayer may not have checked because he or she thought the CDP request was timely), by making a written request, or by confirming that he or she wants the untimely CDP hearing request to be treated as an Equivalent Hearing when notified by Collection of an untimely CDP hearing request. The taxpayer must request the hearing within the one year period beginning the day after the date of the CDP levy notice or the day after the end of the five-day period following an NFTL filing. IRM 8.22.4.3 (Mar. 29, 2012).

46 IRM 5.19.8.4.3 (Nov. 1, 2007).

47 IRM 8.22.4.3 (Mar. 29, 2012). The Collection Statute Expiration date is not suspended for an equivalent hearing. The taxpayer cannot receive judicial review of the equivalent hearing, except for innocent spouse issues, abatement of interest issues, and the timeliness of the CDP hearing request. *Id.* See Treas. Reg. 301.6330-1(i).

AJAC procedures are promising, but need further development.

When a taxpayer requests a CDP hearing, Appeals may receive a partial case file or the case may have no development at all.⁴⁸ Under the AJAC interim guidance, CDP Hearing Officers have three options for cases that are not fully developed.⁴⁹ They can:

- Request information from the taxpayer;
- Issue an Appeals Referral Investigation (ARI) to Collection to secure information;⁵⁰ or
- Make a determination based on the information they have.⁵¹

The AJAC guidance needs further detail to guide Hearing Officers about when to exercise each option. Hearing Officers should only request information from Collection in limited circumstances, which need to be spelled out. For example, if the case file indicates a financial statement was prepared, but it is not in the file, it would be appropriate for the Hearing Officer to issue an ARI. Or, if the taxpayer requests a collection alternative for the first time while the case is in Appeals, an ARI to have Collection review and research is appropriate. However, if the taxpayer has updated financial information to submit, this is squarely in Appeals' jurisdiction, and it should conduct the analysis.⁵² The Appeals response to TAS's research request states, "If the taxpayer submits additional information to Appeals that requires further analysis or more complex development, Appeals may issue an Appeals Referral Investigation (ARI) to the originating function as needed." This response raises concerns because Appeals should analyze the additional or supplemental facts as part of its independent review.

Under AJAC procedures, if the taxpayer submits an OIC, the Centralized Offer in Compromise (COIC) unit will review it and share the results with the taxpayer. If COIC's recommendation is anything other than acceptance, Appeals will make the final determination.⁵³ This approach is positive in that it allows Appeals to retain jurisdiction, ensure the IRS followed proper procedures, and conduct the balancing test.

Concerns remain regarding Appeals' independence from Collection.

Despite the AJAC changes, concerns remain regarding Appeals' independence because it lacks IRM guidance of its own regarding CDP cases.⁵⁴ The AJAC interim guidance advises Settlement Officers to use the Collection IRM to:

- Verify whether administrative procedures were followed in issuing the NFTL or NIL;
- Review Collection case actions and decisions; and

48 IRM 8.22.4.6(3) a-g (Mar. 29, 2012). See also IRM 5.1.9.3.3 (Feb. 23, 2012).

49 See footnote 45 *supra*.

50 Appeals can use an ARI to request a Collection officer research the taxpayer's assets and income, or evaluate their proposed Collection Alternative. Collection provides this information or analysis to the hearing officer.

51 See Memorandum for Appeals Employees, Control No. Ap-08-0713-03, *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project* (July 18, 2013) (revising IRM 8.22.4.2.1). IRM 8.22.4.2.1 was revised on November 5, 2013 and provides only two options in these situations: request the information from the taxpayer or issue an ARI to Collection.

52 "Appeals exercises independent judgment concerning disputed valuations and business decisions made by Collection." IRM 8.23.1.1 (8) (Nov. 20, 2013). "A cadre of Appeals hearing officers will provide the additional review of real property valuations for Appeals." IRM 8.23.3.3.2.5 (Nov. 21, 2013).

53 See Memorandum for Appeals Employees, Control No. Ap-08-0713-03, *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project* (July 18, 2013) (revising IRM 8.22.7.10.6.5). IRM 8.22.7.10.6.5 was revised on November 5, 2013 and incorporates this change.

54 Complaints regarding Appeals' lack of independence have been common since Congress created CDP hearings. In 2012, the IRS published Rev. Proc. 2012-18, which prohibits certain communications between Appeals and the IRS function where the case originated (originating function). See Rev. Proc. 2012-18, 2012-10 I.R.B. 455.

- Evaluate alternatives to collection action.⁵⁵

While the Collection IRM may be helpful in determining whether Collection followed the proper administrative procedures, Appeals needs its own guidelines for evaluating Collection's actions and decisions. One of the primary components of a CDP hearing is the balancing test, in which Appeals must weigh the IRS's need for efficient collection with the taxpayer's concern that the collection action be no more intrusive than necessary.⁵⁶ This balancing test is a fundamental taxpayer right, preventing the government from collecting tax without considering the taxpayer's legitimate interest.⁵⁷ It is unique in that Congress has specifically and statutorily required Appeals to weigh the taxpayer's interest against the IRS's need for collection. When Appeals Officers working CDP cases have to use the Collection IRM, which does not provide guidance on the balancing test, they may not provide a truly independent review or give proper attention to the test.

Without receiving an independent hearing from Appeals, taxpayers will continue to face emotional distress and economic hardship without the protections Congress intended.

Another issue is the practice of sustaining Collection's interpretation without independent verification, especially where Collection determines the taxpayer raised frivolous issues or requested a CDP hearing to delay or impede collection.⁵⁸ The Collection official can assert in the transmittal document that the taxpayer is making a frivolous argument or one intended to delay collection. If Collection believes the CDP request is frivolous, the taxpayer receives a special Appeals letter, giving him or her 30 days to amend the request.⁵⁹ The taxpayer loses the right to a face-to-face hearing if he or she does not amend the request to remove all "frivolous" arguments, including one that reflects a desire to delay.⁶⁰

Appeals does not exercise its settlement authority in CDP cases.

Revenue Procedure 2012-18 and the Appeals IRM make it clear that Appeals has the authority to settle cases.⁶¹ However, Appeals only considers the hazards of litigation in CDP cases in limited situations.⁶² Since the advent of CDP in RRA 98, a significant body of law has developed around what constitutes abuse of discretion on the part of the IRS in collection actions. Where case law is unfavorable to the IRS position or practice in a case, Appeals' failure to take these conditions into account may mean that the

55 See Memorandum for Appeals Employees, Control No. Ap-08-0713-03 *Implementation of the Appeals Judicial Approach and Culture (AJAC) Project* (July 18, 2013) (revising IRM 8.22.4.2.1).

56 IRC § 6330(c)(3).

57 The National Taxpayer Advocate has recommended that fundamental taxpayer rights, such as the right to be heard and the right to a fair and just tax system, be incorporated into ongoing Collection and Appeals training. National Taxpayer Advocate's Report to the Acting Commissioner, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration* 26-27 (Nov. 4, 2013).

58 See IRM 5.19.8.4.7.7 (Sept. 2, 2009). Appeals still receives CDP requests that Collection has deemed to delay or impede collection. Conversely, offers in compromise or installment agreement requests that Collection deems "Solely to Delay" may not go to Appeals. See IRM 5.14.3.2 (3)(e) (Jun. 12, 2009); IRM 5.8.3.13.1 (May 14, 2013).

59 "If I do not hear from you or if you submit another issue that is frivolous, or reflects a desire to delay or impede the administration of federal tax laws, I will disregard your hearing request and return your case to the IRS Collection office that referred it to Appeals." Letter 4380 (July 2008).

60 Letter 4380 (July 2008).

61 "Appeals employees remain ultimately responsible for independently evaluating the strengths and weaknesses of the issues in cases assigned to them and making independent judgments concerning the overall strengths and weaknesses of the cases and the hazards of litigation." Rev. Proc. 2012-18, § 2.02(3)(b). "The judicial attitude is one which reasonably appraises the facts, law, and litigating prospects; uses sound judgment and ability to see both sides of a question; and is objective and impartial. Any approach which contemplates a maximum possible result in favor of the Government or a deficiency in every case is incompatible with a judicial attitude and the Appeals mission." IRM 8.6.4.1.4 (Oct. 26, 2007).

62 "Settlement Officers use hazards of litigation when working Trust Fund Recovery Penalties. Hazards of Litigation are germane to TFRP cases because the determination of the exact amount of the proposed penalty can be tried in court. Collection Due Process cases can be reviewed by the Tax Court, but only for an abuse of discretion, not on the actual case resolution." IRS response to TAS information request (Sept. 5, 2013).

IRS is misapplying the balancing test. If the IRS has a high risk of losing the issue in litigation, then the collection action may not be “no more intrusive than necessary.” In its response to TAS’s research request regarding the hazards of litigation, Appeals stated, “Collection Due Process cases can be reviewed by the Tax Court, but only for an abuse of discretion, not on the actual case resolution.”⁶³ However, the Tax Court’s application of an abuse of discretion standard does not mean that Appeals should not exercise its settlement authority and take the hazards of litigation into account. The rationale for judicial review of collection actions is to provide guidance for when IRS actions constitute abuse of discretion. If the IRS ignores that guidance, it will harm taxpayers.

CONCLUSION

The National Taxpayer Advocate has written about CDP-related issues in numerous Annual Reports to Congress and has offered several legislative recommendations.⁶⁴ Without receiving an independent hearing from Appeals, taxpayers will continue to face emotional and economic hardship without the protections Congress intended. Taxpayers have a right to an independent review of collection actions by an impartial Hearing Officer, who must verify that the IRS followed the law and administrative procedures and conduct the balancing test. To make these protections real, the IRS needs to take the recommended actions.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Require Collection to attempt to contact the taxpayer, preferably by phone, before issuing a CDP notice.
2. Direct the taxpayer to send his or her CDP request to Appeals instead of Collection. If this is not done, require Collection to send cases to Appeals immediately upon receipt of the CDP request.
3. Consider untimely CDP requests as requests for an equivalent hearing if they qualify. Notify the taxpayer by letter and attach a list of questions and answers about equivalent hearings.
4. If a taxpayer reaches an agreement with Collection, do not ask the taxpayer to waive the right to a CDP hearing. Require Appeals to retain jurisdiction of the hearing when a taxpayer reaches an agreement with Collection, meaning Appeals and not Collection enters into the agreement with the taxpayer and conducts the other tasks required in CDP hearings.
5. Require Appeals to suspend a CDP hearing when a taxpayer raises a liability issue for a non-CDP year that would be included in collection alternatives covered by the CDP hearing. Allow the taxpayer to resolve these related liability issues with the appropriate IRS function.

⁶³ IRS response to TAS information request (Sept. 5, 2013).

⁶⁴ See National Taxpayer Advocate 2002 Annual Report to Congress 110-15, 2003 Annual Report to Congress 38-59, 2004 Annual Report to Congress 264-89, 2006 Annual Report to Congress 266-88, 2009 Annual Report to Congress 70-84, 2010 Annual Report to Congress 128-48 (Most Serious Problem: *Inadequate Collection Due Process Hearings May Deprive Taxpayers of an Opportunity to Have Their Cases Fully Considered*); National Taxpayer Advocate 2011 Annual Report to Congress (Most Litigated Issue: *Appeals from Collection Due Process (CDP) Hearings Under Internal Revenue Code Sections 6320 and 6330* 619); National Taxpayer Advocate 2012 Annual Report to Congress 6 (Legislative Recommendation: *Amend IRC §§ 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Egos, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions*).

6. Provide further guidance and examples of when the issuance of an Appeals Referral Investigation is appropriate, and limit the use of ARIs to obtaining additional documentation or facts, not analysis.
7. Update the Appeals IRM to provide significant guidance on CDP hearings, including reviewing the collection action, conducting the balancing test, and considering collection alternatives.
8. Require all Appeals Officers, Settlement Officers, and Appeals Account Resolution Specialists to take updated training on conducting the balancing test and applying the hazards of litigation.